EXHIBIT 39

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SANDRA WILSON Movant, vs. NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	Number 4: 07-cv-708-A May 12, 2009

Hearing on Writ of Habeas Corpus
Before the Honorable John McBryde

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18:00

P R O C E E D I N G S

THE COURT: Good morning. Okay. We're here for a hearing on a limited issue on Number 4: 07-CV-708, Sandra. Wilson against Nathaniel Quartermain, Director TDC Correctional Institutions Division.

Mr. White, do you have someone with you today?

MR. WHITE: Yes, sir, Roberta Walker. She's been admitted.

THE COURT: Let's have the client stand and state her name.

MS. WILSON: Sandra Wilson, your Honor.

THE COURT: Mr. Corcoran is the lead attorney for the respondent.

MR. CORCORAN: Your Honor, this morning Carole Callaghan is here, also.

18:00

THE COURT: Let's swear the witnesses, whoever is here as a witness.

Let's see. Ms. Wilson, Ms. Ray. Do you have witnesses you are going to call?

MR. CORCORAN: Yes, sir.

THE COURT: Ms. Wilson and Ms. Ray.

(Sworn)

THE COURT: I don't know that there is anything else we need to deal with before we get started with the testimony. Are you aware of anything?

MR. CORCORAN: Your Honor, I indicated in our last telephone hearing I wanted to make certain that nothing I do here is considered a waiver of the technical legal defenses under 2254.

THE COURT: Well, I don't know what you are going to do. So I'm not telling you whether it's a waiver. I'll tell you when it's over with.

MR. CORCORAN: 2254(b)(3) indicates whether the State of Texas waives exhaustion, and I can't do it without explicit waiver, and the cases indicate that --

THE COURT: Have you said what you want to say?

MR. CORCORAN: Yes, your Honor, I have.

THE COURT: Okay. You can be seated. Anything else we need to deal with before the evidence starts?

MR. WHITE: No, sir, to my knowledge.

THE COURT: Okay. Call your first witness.

While she is coming to the stand, both of you have filed an exhibit list, and both sides have indicated they have no objections to the exhibits. Do you want to offer now all of your exhibits in evidence?

MR. WHITE: Yes, your Honor.

THE COURT: Okay. I'll receive them all in evidence. I guess it's 1 through 12, isn't it?

COURT: Did you have any exhibits?

MR. CORCORAN: Yes, sir, 13 through 15

THE COURT: Do you want to do them out of order?

MR. CORCORAN: Yes, sir.

THE COURT: Do you have any problem with that?

MR. WHITE: No, your Honor.

THE COURT: I will consider Exhibits 13 through 14 have also been received.

Okay. You may proceed.

SANDRA WILSON

DIRECT EXAMINATION

BY MR. WHITE:

Q Ms. Wilson, do you understand what we're doing here today?

A Yes, sir.

Q What is your understanding of what we're doing here today?

A Trying to see what's going on.

THE COURT: What did you say you understood it to be? Why do you think we're here today?

THE WITNESS: To see what's going on with me.

THE COURT: Okay. That's good enough.

BY MR. WHITE:

Q You are in prison in the TDCJ, correct?

A Yes.

Q And you are in Gatesville; is that right?

A Yes, sir.

Q And you are in a special unit for mental health and mentally retarded defendants, are you not?

A Yes, sir.

Q And you have counselors and everything while you are down there?

A Yes.

Q And what medications do you take?

A Haldol, 150 milligrams once a month. I take Thorazine, Methium and Travasol.

Q Do you know what each of those medications are for?

A For my voices and suicide.

Q And you had your Halydol shot one day last week; is that right?

A Yes, sir.

Q And the rest of the medications you take on a daily basis?

A Yes, sir.

Q And you have had those medications today?

A Yes, sir.

Q Do they affect your ability to understand my questions?

A Yes, sir.

THE COURT: You don't understand his question fully?

THE WITNESS: Just a little bit.

THE COURT: Well, have you understood all of his questions so far?

THE WITNESS: Yes, sir.

THE COURT: Will you let us know if you don't understand the question?

THE WITNESS: Yes, sir.

THE COURT: Of course, I don't think I will know when she understands the questions.

BY MR. WHITE:

Q You listed the medications that you take. What are your mental health diagnoses or have the doctors told you from a mental health standpoint exactly what you have?

A Paranoid schizophrenia, depression, suicidal and bipolar.

Q You are actually now doing a fifteen-year sentence?

A Yes, sir.

Q And you received that sentence in January of 2007?

A Yes, sir.

Q Do you remember the hearing that day on January the 5th?

A Yes, sir.

Q Let's go back a little bit before that hearing.

You were actually arrested on November 7th. Is that right?

A Yes.

Q And you spent a little time in the Mansfield Jail, correct?

A Yes.

Q And then they eventually took you down to Tarrant County in downtown Fort Worth; is that right?

A Yes, sir.

Q And about how long were you in jail before you met Mr. Ray?

A About a week.

Q And where did you first meet him at?

A In the holding tank area to get the lawyer appointed to me.

Q So he was appointed to you, and that's when you met with him?

A Yes, sir.

Q Do you know how long that conversation was?

A It was like about two seconds.

Q Do you recall what was said?

A He told me that the judge wanted to plea bargain with me for twelve years, and I told him I didn't want it.

Q Did you tell him why you didn't want it?

A I didn't know what they really had on me then.

I was confused and messed up and stuff. I hadn't had any medication or nothing like that.

Q How long had it been since you had had your medication?

A About three weeks.

Q So you have been off your medicines about three weeks. Do you act differently when you don't have your medicines? What's the difference?

A I be very scared around people. I tries to cut myself and stuff I get so depressed. And I just don't know what to do sometime. I don't know the right thing to do.

Q Did you understand at least the brief conversation that you had with Mr. Ray that first time you met him?

A Yes, sir.

Q Did you discuss -- On the first day, did you discuss anything about your mental retardation or mental health issues?

A Yes, I told Mr. Ray when I was in the holding tank, I said "Do you know I'm MHMR and I'm suicidal and stuff like that?" He didn't respond to it, what I was telling him. So I hung myself in the county jail and woke up in ICU. Stayed in ICU for five days. They returned me back to the jailhouse.

18:00

THE COURT: Let me interrupt you for a minute. What is it that you say you told Mr. Ray?

THE WITNESS: He didn't respond to it.

THE COURT: What did you tell him?

THE WITNESS: I was in the hospital for hanging myself, and I had died, and they brought me back, and when we went to the judge, I thought he was going to bring it up, but he didn't say anything about it.

THE COURT: How long before you met Mr. Ray did you hang yourself?

THE WITNESS: He was my lawyer. I did it while he was my lawyer. He come to the county jail to visit me, and they told him I was in the hospital, and I said "Did they tell you that I had hung myself and they had to bring me back to life?" He didn't respond to any of that.

18:00

THE COURT: Is this conversation the first time you met him?

MR. WHITE: I believe she may be confused with that first conversation, and some of this happened well after that.

THE COURT: Well, I'll have to let you clear it up with her if she is confused.

BY BY MR. WHITE:

Q Now, the first day you met him you only talked for a couple of seconds?

A Yes, sir.

Q And I know we'll talk more about the suicide attempt and other things that happened in the jail for just a minute. But right now, the first time you met him you talked for a few seconds, correct?

A Yes.

Q And at the first time you met him, did you tell him about your mental health and retardation?

A Yes, I did.

Q You didn't say anything about suicide because that hadn't yet?

A No.

Q But the first time you did discuss your mental health and mental retardation issues?

A Yes.

Q And what did he tell you?

A He asked me did I know what I was there for, and I told him yes. I was charged for a dope case. And he went out and went in with the judge and came back, and he said he wants you to plea bargain for twelve years, and I said "I don't want to plea bargain because I didn't sell no dope to nobody." And then I didn't see him until I came out of the hospital.

Q So on the first day you met him when he was talking about the twelve years, did you tell him anything

about your mental retardation and health?

A Yes. I told him I was MHMR, and I had a lot of psych diagnoses.

Q But you weren't taking your medications?

A No, sir.

Q So you did not take the twelve years that Mr. Ray was talking about the first day?

THE COURT: Let me ask her a question. The twelve years that you are talking about, did you think that was for a drug offense or what you had pleaded guilty to earlier?

THE WITNESS: The twelve years was the probation.

THE COURT: For when they terminated you --

THE WITNESS: No, no.

THE COURT: You got deferred adjudication for some kind of theft?

THE WITNESS: Robbery by bodily injury.

THE COURT: That's where you got deferred adjudication from. And you were in jail because somebody said you violated your deferred adjudication, and that's why you were in jail?

THE WITNESS: Yes, sir.

THE COURT: Did you understand the twelve years was what the judge was offering to sentence you for the

robbery?

THE WITNESS: Yes.

THE COURT: Is that what you understood?

THE WITNESS: Yes, sir.

THE COURT: Because you were subject to having your deferred adjudication or probation revoked?

THE WITNESS: But at the time I thought I was going for the dope case at the time. And then after the dope case got dismissed and then the judge told Mr. Ray to stand up, and we stood up, and he said anything else you want to say on her behalf.

THE COURT: Well, we're getting ahead. I'm trying to find out if there was anything else besides the twelve years. At the time you didn't think that was for a drug case, did you?

THE WITNESS: I thought it was a drug case. They didn't say nothing about the probation hearing.

THE COURT: You mean when Mr. Ray came to see you, you thought he was representing you in the drug case; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Was he, in fact, representing her in the drug case?

MR. WHITE: I believe so, your Honor.

THE COURT: And you thought the twelve years was

for the drug case?

THE WITNESS: Yes, sir.

BY MR. WHITE:

Q So after that first time -- After the first time you met Mr. Ray, you didn't take the twelve years, and they take you back to the jail?

A Yes, sir.

Q Did they put you in the regular jail with all the rest of the women or some sort of a special floor or special place?

A They put me in with all the womens.

Q And how did you do when you were in there with all the women?

A That's where I got depressed, and I hung myself.

Q And that would have been sometime around the 1st of December?

MR. CORCORAN: Your Honor, may I object for leading purposes.

THE COURT: Well, he's been testifying for her ever since it started.

MR. CORCORAN: Well, I wanted to see where this went but --

THE COURT: I think we better let her testify on her own, Mr. White. I understand the problem, and I may allow some leading.

BY MR. WHITE:

Q What happened while you were in jail around the 1st of December?

A I got depressed, and I went upstairs, tore my sheet and tied it around my neck tight, and the next thing I knew I woke up in the ICU.

Q At the hospital?

A Yes, sir.

Q And what happened while you were at the hospital?

A I had several doctors took X-rays of my neck, and I punched a disk out the back of my neck, and they said I needed surgery. In the meantime, they gave me a brace to wear around my neck. So when I pulled chain at TDC, I had the brace around my neck.

Q Did you have medication at the hospital?

A Yes, sir.

Q What was that medication?

A The same kind I was taking, the Halydol and Thorazine and stuff.

Q Why did you get depressed and try to hang yourself in jail?

A Behind this case because I knew I wouldn't admit to it.

Q And how long were you in the ICU?

A Five days.

Q And then where did they take you?

A Back to Tarrant County.

Q How long before you get back to Tarrant County is it before you saw Mr. Ray?

A I seen Mr. Ray a couple of days after I got back. He come and visited me.

Q Tell me about that conversation. What did you all talk about?

A He was telling me about my case and stuff, and I was trying to tell him about what happened to me, and he acted like he wasn't concerned about it. He kept going over something. I don't know what it was. But I tried to tell him I needed help. I tried to kill myself, and I needed to go to the doctor or state hospital or somewhere. But he acted like he wasn't concerned about my retardation.

Q Did you have that collar on your neck?

A Yes, sir.

Q Describe that collar for me.

A It was a thing around my neck, and it was blue and white and held my chin up and lifted the back of this up, and he didn't even ask me what it was when he seen me, what happened. I told him.

Q If anybody looked at you, could they have seen

that collar?

THE COURT: Had you wore a collar sometime before that?

THE WITNESS: No, sir. No, sir.

THE COURT: Okay.

BY MR. WHITE:

Q What else did you talk about on that meeting after you came back from the hospital?

A He told me I was going to court and what day, and when that day came, I went to court, and we was in front of the judge, and the judge asked me some questions.

Q Let me stop you for a second. That is when you all go to court a couple of days later, right?

MR. CORCORAN: Objection, your Honor.

18:00 THE COURT: Well, I think maybe that was okay. But really don't lead her too much. Ask her the question again in such a way that it's not you testifying.

BY MR. WHITE:

Q After the meeting -- after you came back -- After that meeting, when was the next time you saw Mr. Ray?

A In court.

THE COURT: How long was that between the last time you saw Mr. Ray? And you told us about him seeing you in the neck brace. How long was it between that time

and the court?

THE WITNESS: About a week, Judge.

BY MR. WHITE:

Q Do you talk to him before you actually go in the courtroom and see the judge?

A Yes, sir. I asked him what I was going to court for, and he said the dope charge.

THE COURT: Where were you when you talked to him?

THE WITNESS: In the holding cell.

THE COURT: Right outside the courtroom?

THE WITNESS: Yes, sir.

BY BY MR. WHITE:

Q Did you still have your collar on?

A Yes, sir.

Q Did you talk about that?

A "I tried to hang myself, Mr. Ray." He said "I seen, I seen, I seen."

Q What did you tell him about why you had the collar on?

A I told him that I had hung myself. He didn't seem concerned, so I didn't say no more about it.

Q So you go out and you have a hearing about your probation. Did you know that it was about your probation?

A No. We went to the hearing for the dope case.

Q And what happened at that hearing?

A Mr. Ray had me up on the witness stand and testify about the dope case, how the two gentlemens had come in and testified. I wasn't understanding they was taking me to trial for my probation thing because he didn't mention it to me, and then the judge told us to step out, and he came and got me when the judge got ready, and the judge said Ms. Wilson and he said yes and he said what he had to say. I can't remember anything. So before I went up there, I said Mr. Ray, "Are you going to tell them about my neck and stuff and I suicided and mentally retarded?" But he never said anything back. So after that the judge left and went to the chambers and whatever, and he came back, and Mr. Ray told me to stand up, and I stood up, and the judge said "I'm giving you fifteen years in TDC and I was like "Fifteen years? What did I do to get fifteen years?" He just didn't help.

Q What happens after you leave the courtroom? Do you speak with Mr. Ray again?

A No, sir, they took me back upstairs.

Q Have you spoken with Mr. Ray since?

A No. This is the first time I have seen him since I have been back today.

Q What happens in the jail after you get back from the court?

A What happened?

Q Yes, ma'am.

A I was in the pink room. That's a suicidal room, no sheets or nothing. Three days later I was shipped to TDC.

THE COURT: Mr. White, help me with something. Was she ever tried for the drug offense that she's told us about?

MR. WHITE: No. If you look at our stipulations that offense was ultimately dismissed on the 8th of January.

THE COURT: Did she ever appear in court in connection with that offense?

MR. WHITE: Not to my knowledge, your Honor.

18:00 MR. CORCORAN: We can ask Mr. Ray, but I'm not aware of any appearance as to that.

BY MR. WHITE:

Q So how many times did you attempt to commit suicide while you were in the county jail? Once before your hearing and once after?

MR. CORCORAN: Objection, your Honor, again, he's leading the witness with respect to the dates.

THE COURT: Well, I'm not sure that the after has too much relevance anyway, does it?

MR. WHITE: I'll move on, your Honor

BY MR. WHITE:

Q Ms. Wilson, when you came back from the hospital after committing suicide, where did they place you in the jail?

A In the pink room.

Q What is your understanding of what the pink room is?

A It's for me not to commit suicide. It was just a room with a floor. No cover, no nothing.

Q How long do you remember being in that pink room?

A I was in there about two weeks.

Q And who came to visit you during that two-week period while you were on suicide watch?

A Nobody.

Q You don't recall Mr. Ray seeing you?

A He didn't see me.

Q How long was it after you got out of the pink room before you saw Mr. Ray?

A When they came and got me and took me to court and I seen him down there in the chambers thing, the holdover tank.

THE COURT: That was the next time you saw Mr. Ray after you got out of the pink room?

THE WITNESS: Only time.

THE COURT: Is when you were in the courtroom in the holding cell off the courtroom?

THE WITNESS: Yes, sir.

THE COURT: Did you go in the pink room as soon as you got out of the hospital?

THE WITNESS: Yes, sir, I did, Judge.

THE COURT: You must not have seen Mr. Ray after you got out of the hospital until you went to the Court. Is that right?

THE WITNESS: Yes, sir.

THE COURT: Had you seen him any before you went in the hospital?

THE WITNESS: No, sir.

THE COURT: Hadn't seen him at all before you went to the hospital?

THE WITNESS: When I went to the jailhouse to the county, they take you downstairs and appoint you a lawyer, and that's when I got to know Mr. Ray.

THE COURT: How long was that -- Was that before or after you went into the hospital?

THE WITNESS: I think it was before.

THE COURT: So you did see him before?

THE WITNESS: I think it was.

THE COURT: Are you sure?

THE WITNESS: I can't remember. I'm on

medication messing with my mind.

THE COURT: Go ahead.

MR. WHITE: I pass the witness.

THE COURT: Do you have any questions you meant to ask?

MR. CORCORAN: Your Honor, we pass the witness. No questions.

THE COURT: Okay. Call your next witness.

Let me ask you one other question before you step down. When the judge revoked your probation or whatever you call it, your deferred adjudication -- when the judge revoked that, what did you understand he did it for? What had you done to cause him to do that?

THE WITNESS: I didn't understand it at all. I didn't understand nothing what they was doing.

THE COURT: Did you think it was because of that drug deal?

THE WITNESS: Yes, sir.

THE COURT: You thought that's why he revoked it?

THE WITNESS: Yes, sir.

THE COURT: Why did you think you got a fifteen year sentence?

THE WITNESS: Missing three reports reporting because they throwed the dope case out.

THE COURT: Pardon?

THE WITNESS: Behind the dope case, they throwed it out. They got me for three times missing reporting.

THE COURT: You think they threw out the dope case?

THE WITNESS: And then a probation violation.

THE COURT: You didn't report three times to the probation officer?

THE WITNESS: I didn't report three months to the probation officer.

THE COURT: You think that's why you got a fifteen-year sentence?

THE WITNESS: Yes, sir.

THE COURT: Not from the drug deal.

THE WITNESS: Yes, sir.

THE COURT: You knew that at the time you got sentenced?

THE WITNESS: Yes, sir.

THE COURT: And you knew you were being sentenced for the original robbery because you violated your probation?

THE WITNESS: Yes, I missed reporting three months, and they denied my probation.

THE COURT: Okay. You can step down.

MR. WHITE: Your Honor, I rest.

THE COURT: Okay. I thought you were calling Mr. Ray. Do you have any evidence you want to offer?

MR. CORCORAN: Yes, your Honor. We call Mr. Ray.

(Sworn)

MR. WILLIAM RAY

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Could you please state your name?

A William Ray.

Q And what is your occupation?

A I'm an attorney.

Q And were you a criminal defense attorney in the time frame we were just discussing, late 2007, 2006?

A Yes, I was.

Q And at the time, did you represent a woman named Sandra Wilson?

A I did.

Q And can you describe her?

A Seated at the counsel table behind you. Third from my left, wearing a light tan colored --

THE COURT: The one that just got off the witness stand?

THE WITNESS: Yes, sir.

THE COURT: He's identified her.

BY MR. CORCORAN:

Q Before we get into the details, can you give us an overview of the purpose of your representation of Ms. Wilson?

A I was appointed to represent Ms. Wilson. She had a probation violation which was the primary reason I was appointed to represent her. She also had a drug case that was mentioned this morning, and I was appointed on both of those cases. Judge Gill -- I was not a public defender per se like they have -- an assigned public defender. Judge Gill would appoint me on people who had additional violations, and he would appoint me on those cases at that time.

Q If there was a deferred adjudication in Judge Gill's court, how would that work if there was a new charge?

A Well, what happened, in Tarrant County there is a rotating basis of people that are appointed, and judges can go outside that rotation and appoint people outside the wheel. Judge Gill appointed me and other judges would appoint other lawyers on people that had probation violations because those cases they never had a jury trial, and they were typically all settled without a trial. And he would appoint me outside the process, which the law allowed him to do.

Q Do you remember the date that you were appointed?

A I do. I was appointed to represent Ms. Wilson on November 13, 2006.

Q What was the nature of that initial contact? Did you see her before that date?

A We never met before that.

Q Did you see her on that date?

A Yes.

Q Where would that have been?

A In the hold-over cell adjacent to the courtroom. I think that's what she mentioned. And what happened is there would be a list of people that he would have set that day, and he would have people in custody brought over from the jail, and if they didn't have a lawyer, he would appoint a lawyer or see if they wanted to hire a lawyer. There was a couple of different choices. They would fill out paperwork or the bailiffs would go over it with them, and if they qualified for a court-appointed lawyer -- and most people in jail did -- he would appoint a lawyer.

If it was a probation violation, he would generally appoint me. Another type of case, in other words, a new offense and not necessarily a probation violation, sometimes he would appoint me and sometimes appoint other lawyers.

THE COURT: Why did he prefer to appoint you? How did that process develop?

THE WITNESS: He had this process with two other lawyers prior to me, and both of those lawyers decided they wanted to change their practice a little bit. At one point in time similar to the federal public defender, it was a county paid position, and a lady had that. Her name was Roxanne Robinson. And that was eliminated before I started, and he would just appoint me because he felt like I took care of my business pretty well.

THE COURT: He knew your history?

THE WITNESS: Yes, sir.

THE COURT: How long was that going on before you were court-appointed to represent Ms. Wilson?

18:00 THE WITNESS: He probably started that in 2001, 2002.

THE COURT: How many a week would you handle on this kind of a procedure?

THE WITNESS: Anywhere from four or five to ten to fifteen.

THE COURT: Go ahead.

BY MR. CORCORAN:

Q When you did this for Judge Gill, what was the total number of cases approximately that you did in front of him?

A I can't tell you exactly, but I think it's about four or five hundred.

Q Let me ask you this. Was it November 17?

A 13.

Q Had you -- Actually, let me take a step back. How did it work with respect to a revocation? Did you negotiate with the prosecutor or how did that work?

A In Judge Gill's court, what would happen is the probation officer would bring their files over to the court. He would look at the files, and he would write whatever his offer was in the file. In his court as opposed to other courts, there was no interaction with the prosecutors. They didn't enter into the conversation unless it became a contested matter. So to answer your question more specifically, Judge Gill made the offers and the negotiations, if there was any, and quite frankly, there wasn't much was directly between myself and Judge Gill.

THE COURT: How did you know what the offer was?

THE WITNESS: He would tell me. He would write it in the file, and it was generally in a specific part of the file. He wrote it down, and I knew what it was.

THE COURT: Did it depend on whether the person confessed?

THE WITNESS: Depended on what they were on

probation for and what the new allegation was.

THE COURT: What was the range? Was it always close to twelve years?

THE WITNESS: In that type of case -- And I have given counsel some of those as your exhibits -- he would almost always if a person had a robbery deferred adjudication and they had a new offense, the offer was almost always twelve years, and it was even predictable. I never bet anybody, so to speak, but I was pretty close to doing it after three or four years. I knew about what he was doing to do.

BY MR. CORCORAN:

Q At the first meeting, November 13, had you looked at this file and did you know what the offer was at that time?

A I knew the offer. And I spoke with Judge Gill, and then I went and spoke with Ms. Wilson.

Q Did you communicate that?

A Yes.

THE COURT: Was that in the holding cell?

THE WITNESS: Yes.

THE COURT: Was that the day of the hearing?

THE WITNESS: No, sir. The day I was initially appointed. Sometimes he accepted the offer and we plead it right then. Sometimes people wanted to think about it,

and Judge Gill would typically leave that offer open until the day of the hearing.

THE COURT: What was the purpose of her being there that day? Like an initial appearance?

THE WITNESS: Yes, sir. Sometimes they will set a bond if there is a bond set, but it's the basic first appearance.

BY MR. CORCORAN:

Q And before I get into the details of this case, just based upon your experience in the potentially hundreds of cases you have done in front of Judge Gill -- if there was a motion to adjudicate and deferred probation and in this case it was a second degree felony, two years to twenty years, did he peek at the prior case to see what the prior sentencing range was?

MR. WHITE: Objection, your Honor. Speculation.

THE COURT: I'll overrule the objection.

A I can't say that he did that in every case, but in the probation file there was a copy of the offense report, and sometimes he would be reviewing those. He would review those probation files when he was sitting there, in front of him, and sometimes I might walk down the hall to talk to somebody else. I was not automatically there when he was reviewing them, but they were there for him to look at.

THE COURT: You say you learned twelve years was what he would offer in a robbery, probation violation. What was the range for failure to report?

THE WITNESS: Between five and seven years. If it was a person that didn't report for a year -- They typically didn't put out a report until they have missed three times. Sometimes they say you do a weekend in jail, and it never got to me. But after the third month on a warrant -- If they caught them pretty quick, his offer would be a little lower because they wouldn't have missed as many months.

THE COURT: Five to?

THE WITNESS: Eight. In that area.

BY MR. CORCORAN:

Q Directing you to November 13, did she indicate that she wanted to accept the offer?

A She said she did not want to accept the offer.

Q Did she indicate to you at that time any mental issues she had?

A I don't have any specific recollection of her telling me that she was mentally ill. She could have very well have said the things she said she did. If she had, she would have caused me to take a certain course of action. She could have said MHMR.

Q Well, your recollection of interacting with her,

did alarm bells go off when you interacted with her in terms of competency?

A No, if she had said those things -- And I'm not saying she didn't. We would have conversation about whether I thought she was competent and whether she had any defenses that might apply. People sometimes say I don't know what we're doing here and I don't know what this is all about. And Judge Gill was pretty good about taking those out of the loop.

Q So you might have brought that up with Judge Gill if you believed there was an issue?

A Sure. And he would take them out of the loop of having a hearing which the hearings were accelerated. This is actually a little longer period of time before the final hearing. If a person was incompetent or I thought so, he would say fine, and he would appoint a psychologist to see them in the jail, and we would deal with that, depending on the report.

THE COURT: Are you talking about competent to participate in the hearing?

THE WITNESS: Yes, sir.

THE COURT: As opposed to general mental health?

THE WITNESS: That's correct.

BY MR. CORCORAN:

Q With respect to general mental health, what is

your sense based upon the number of cases you have done in front of Judge Gill about how mental health might be a factor in his decision?

A If the person was sane and competent, my experience was it didn't make a whole lot of difference.

THE COURT: Well, let me ask you what category you would put this defendant in, assuming she's mentally retarded and has a schizoaffective disorder, anti-social disorder and borderline bi-polar?

THE WITNESS: I would have had concern about those. However, my experience is with Judge Gill it wouldn't have made much difference.

THE COURT: You would have had concern?

THE WITNESS: If I had known -- and I didn't -- I would have asked Judge Gill refer her to a psychologist and he would have had somebody go see her, and we would have been right back when she was competent.

BY MR. CORCORAN:

Q Did she have an opinion with reference to her defense or what she wanted to do?

A She provided the name of a codefendant in her case. I don't remember if it was that day or a subsequent day, but at some day prior to the hearing she told me -- I think it was the day I visited her in the jail which may have been in the jail. I'm a little unclear on that. But

there was a point in time when I talked to her which may have been that day, but it could have been a later day, and she indicated to me she had a witness which was the codefendant in the case, and he actually testified at the hearing, and she indicated that he would say "These were my drugs, I was the one selling the drugs," which is what he said. I had him brought to court, was my recollection. He had already been sentenced, and I asked him "Ms. Wilson said that you will take the rap for her," and he did. He testified.

Q Did you explain the purpose of the hearing, the hearing to dispose of the new charges, or how did you explain that?

A Well, what I would have told her was the hearing or the trial on her new case wouldn't necessarily take place before the hearing. The revocation was going to be heard, and at that time the new allegations would be part of it.

Q Did she have any point of view with respect to the technical violations on the motion to adjudicate? Did she ask you to do anything or advance any theory?

A You are talking about not reporting?

Q Yes.

A She admitted she didn't reported. She didn't argue about that. The petition alleged the new offense

and alleged she didn't report, but it also alleged a nonreporting which was like the next day or right afterwards, and when she pled and they go over the accusations with you, she had indicated that accusation was not true, but the allegation of not reporting for the two or three months was true.

THE COURT: Did he revoke her on the one she actually admitted?

THE WITNESS: That's correct. Failure to report.

BY MR. CORCORAN:

Q Direct your attention to the new offense allegations. Did Judge Gill find that true?

A He found that not true.

Q And what was your sense of the rationale for that?

A He found that was not true because the State -- Right at the beginning of the hearing, the State asked to amend their petition to allege constructive transfer as opposed to actual transfer, and I didn't have any objection to that. But in the hearing, at the end of it, he called somebody on the phone or looked something up himself. He came back and found that transfer not to be true, and it happened on this case or the one prior to this.

18:00 The reason he did that --

MR. WHITE: Objection. Speculation.

THE COURT: Well, if you don't know which case it was for sure, it would be speculation.

MR. CORCORAN: May I ask him to explain what he thought the judge was doing?

THE COURT: Well, are you telling us you are not sure if it was this case or the prior case?

THE WITNESS: Well, the reasoning is the same.

THE COURT: That it happened in this case?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

THE WITNESS: With the constructive delivery, there is an added element. The State has to prove that the defendant had some ownership or proprietary interest in the drug. Whereas, actual transfer you can be the party, the person standing in the street. But if they allege constructive transfer, which is what they did or they changed it to, the State would have to prove Ms. Wilson had some knowledge or ownership of how the drug transaction worked, and that's not true.

THE COURT: We're going to take a brief recess.

(Recess)

THE COURT: Let me ask you a question before you get started. Did Judge Gill -- did he have a standard

sentence that he imposed under certain circumstances? You told me about his plea offers were standard.

THE WITNESS: Yes, sir.

THE COURT: Did he also have standard sentences?

THE WITNESS: In some cases he did.

THE COURT: What was his standard sentence in somebody who had robbed somebody and got deferred adjudication and then dealt in drugs? What was his sentencing under those circumstances?

THE WITNESS: I'm assuming a new felony, fifteen years.

THE COURT: What was his sentence if she had the robbery and then the technical violations she admitted to?

THE WITNESS: That was a little less specific, but it would have been somewhere between five and eight years, if that had not been an allegation in this case.

THE COURT: And of course, both of my last questions assumed she rejected his plea offers, and you answered on that basis.

THE WITNESS: Yes, sir.

MR. CORCORAN: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. CORCORAN:

Q Let me refer you to what has been marked as

Exhibit 13. It refers to Steven Forrest Eaton. Is that correct?

A Yes, sir.

Q Can you explain those handwritings and markings?

A In the bottom right-hand corner of Exhibit 13, this is a copy of the State's third petition to proceed to adjudication, and that's my handwriting and what I wrote was contract "CT" which means Court, 3-5-07, which was the day that Judge Gill made the offer on his case which would have been twelve years, TDC.

Q In terms of how this relates to Ms. Wilson, can you explain the connection?

A Well, burglary of habitation is typically second degree felony which is what he was on probation for. His case was 2004, new drug offense, and Judge Gill's offer was twelve years.

In Ms. Wilson's case she was on probation for robbery which is also a second degree felon, and she had a new drug offense, and Judge Gill's offer was the same.

Q Exhibit 13 on the third page, can you explain what the writing there means?

A The third page is my fee voucher that we use in the courts, and it has the case number of the court; the defendant's name, Steven Eaton, the day I was appointed, the number of appearances I had on that case, the type of

offense which I would just put revocation, if that's what it was. And in the middle of the page what I did is draw a line -- Typically that line was kind of at a forty-five degree angle. I would put the date, the sentence which in this case was March 14 of 2006, sixteen years, TDC then what I wrote underneath is "no guns/enhance." And what that means is I told Mr. Eaton that he could no longer possess a firearm or ammunition for the rest of his life, and if he ever got another case, this case could be used to enhance his punishment. Up above that there is a triangle which stands for defendant. And he indicated he wanted to appeal, and the next note is I told -- And the defendant was told and I would have told him in his instance that he didn't have much of an appellate right since he was on deferred adjudication.

18:00

Q Now, directing you to Exhibit 14 which believe refers to John Henry Ogle. Is that your handwriting on Page 1 again on Number 14?

A Yes, it is. On Mr. Ogle's case, the State's seconds amended petition to proceed to adjudication, he was on probation for indecency with a child, second contact which is a felony. It was on deferred adjudication. He was alleged to have committed two new offenses. The judge's offer was twelve years TDC.

Q And on the fifth page -- So this would be

Exhibit 14, fifth page, what do the written notes there mean? Are those your handwriting?

A Yes, of course, it's got his full name and the day I was appointed and the number of appearances. On 7-18 and it looks like 2000, but it has to be 2006. He got twelve years TDC. I also explained to him that he could not possess a firearm. That's where it says "no guns" and the notes underneath that -- it says "life," and it means either life registration which I would have told him about, but he would have already been under that, but also the way the sentencing statute works for this offense is if he gets another sexual offense I would have told him that it would be an automatic life sentence. I didn't always tell people that, but if I wrote it down, I told him.

THE COURT: Do you have something similar to what we have looked at related to Ms. Wilson?

THE WITNESS: Yes, sir.

THE WITNESS: It's Page 3 of Exhibit 12.

THE COURT: Exhibit 12.

MR. CORCORAN: Yes, sir.

THE COURT: Go ahead.

BY MR. CORCORAN:

Q On Page 12, is that your handwriting on the first page?

A Yes, sir.

Q And again, can you say what that indicates?

A That would have been on November 13, 2006, Judge Gill's offer was twelve years TDC.

THE COURT: Let me interrupt you a minute. Does anyone have access to what Judge Gill writes that twelve years on? You said he writes it on something.

THE WITNESS: He writes it in the probation file. Anybody that wants to look at it can.

THE COURT: Is that part of the record in this case, Judge Gill's notation?

MR. CORCORAN: I don't think it is, your Honor.

THE COURT: Go ahead.

BY MR. CORCORAN:

Q And then I think it's the third page. It's your fee voucher. What page number is that?

A Page 3 of Exhibit 12.

Q Explain the handwriting.

A Case number, her name, date of appointment I have 12-18-2006 which is not correct. The revocation and number of appearances. And then where the line and date was, disposed was January 5 of 2007 she got a fifteen-year TDC sentence, and then I wrote the defendant was pissed.

Q What do you mean by that?

A After the hearing -- which is when this is

happening if a person is pleading. But after the hearing I will go back and tell them what their situation is and whether it can be used to enhance their punishment. And when I tried to talk to Ms. Wilson she was mad. So I didn't tell her those things.

THE COURT: What does that mean right there?

THE WITNESS: That's four times I went to court. That was the way I was paid. If I did any out-of-court time since I did some of them, he paid me based on appearances, and that kind of took all of that into consideration. If I went to the jail and spent half an hour, that wouldn't have been on there.

THE COURT: Well, why would you have four on here?

THE WITNESS: Initial appearance, the case was set on the 18th of December. We were going to have a hearing that day, but the State got a continuance. One of their police officers couldn't be there, and it was reset to January. And I initially thought that I had gone to see her in the jail on December 12, but a couple of days ago when I was looking at my notes again I found a note that said expand. When I looked at this, Exhibit 12, Page 3, that means I was in court four times. So that conversation must have happened in court for certain. Four appearances is what it stands for.

THE COURT: Well, you have to go to court on the occasion the State got a continuance. You have an appearance that time and the final time?

THE WITNESS: What I believe, Judge, is the 12th of December we also went to court. I had a conversation with her on that day. I thought it was in the jail when I look at my notes. It would have been to either plead the case -- Sometimes they set the cases when they think they are a plea, and they turn out not to be. I thought that's what happened this morning. But on my note which I gave counsel this morning, it has two or three other people's names, and I talked about how they wanted to handle their cases.

THE COURT: Do you remember her wearing a neck brace?

THE WITNESS: I didn't remember it until Mr. Corcoran reminded me it was in the testimony. I don't specifically remember it, but it's got to be true because two of the witnesses identified her as the lady in the neck brace.

THE COURT: Nobody described her on some prior conduct of having a neck brace?

THE WITNESS: No, just at the hearing. I don't know that she did or didn't. She said she had it in the jail. That could very well be true.

BY MR. CORCORAN:

Q Referring your attention to Exhibit 15, I believe that refers to Penny McGee. Could you explain Exhibit 15, what your marks mean?

THE COURT: If you had, it wouldn't do any good because I can't read mine.

THE WITNESS: I can tell you what that is. I have a better copy. What I did, the copy I originally sent you and Mr. White, that's my fee voucher for that day.

I printed out another one, and I sent it to you all on Friday. I printed that out from the county's which I have access to, the document that you have which is the one that's all discolored. That's the one that went through a scanner at my office. That's the only copy I have which is accurate. I included the judgment which shows what his sentence was which is on that document, but you can't hardly read it.

Q Is Penny a male or female?

A Penny is a male.

MR. CORCORAN: Your Honor, I think I gave the exhibit I was going to hand to you to Mr. Ray. We got some documents from Mr. Ray.

THE COURT: You are adding an exhibit?

MR. CORCORAN: I believe Mr. White has no

objection.

MR. WHITE: We have no objection.

THE COURT: What are you going to call 16?

MR. CORCORAN: Mr. Ray.

THE WITNESS: 16 is several different things. You want me to explain what they are?

MR. CORCORAN: It if that's okay, your Honor.

THE COURT:

MR. CORCORAN: Let's call them Bill Ray notes.

BY MR. CORCORAN:

Q Mr. Ray, can you quickly go through Exhibit 16 and I'll stop you or the Court will stop you if we have any questions. I don't want to take too much time with this. Can you explain what it is?

A The first page is what's called a tracking log. The bailiffs in the county have to send a request to get somebody out of the jail. This is a request to the jail to get them ready to bring them over. It has various people's names. Some of them are my clients, and some are another person's client. The third one down is Brian Jones. He had question marks and then probation revocation. I may very well have ended up representing that guy.

A Then right under that J. Harding. That was his client. The next page, it's two petitions to proceed to

adjudication on a Bernard Hightower. He was on probation for two aggravated robberies, and it was alleged that he committed a new offense, and Judge Gill's offer was twenty years on those cases. The following page is the county printout from the county computer. This is page 16-6 that just has Mr. Hightower's criminal record in the county. 16-7 and 8 deal with his specific robbery case. 16-9 is the pay voucher for Mr. Hightower, and then 16-10 and 11 are the notes on the hearing we had in the hearing on Penny McGee's case. These are the notes I took during the revocation hearing.

BY MR. CORCORAN:

Q Can you explain what your symbols mean? What's going on on Pages 10 and 11?

A Mr. McGee was charged with a new offense of assault which I believe was his girlfriend, and we had a hearing on that, and the police testified. I believe there was two police officers that testified. She, the victim in that case, did not testify. She either didn't come to court or they couldn't find her or uncooperative. But the police were allowed to testify, and you can see on there where I made on objection which is referenced "OBJ" and then "H" which is about the middle of Page 16-10. The judge overruled that objection, and I was allowed a running objection to what the officers were talking about

as far as what she told them which is what the State needed to prove, that Mr. McGee assaulted his girlfriend or wife or whatever she was. The point in all of that was that this lady didn't come to court, and yet Mr. McGee's probation was still revoked.

Q Direct your attention to Exhibit 17.

THE COURT: What are we going to call it?

MR. CORCORAN: Additional Bill Ray notes.

THE COURT: Bill Ray Notes Number 2. 16 and 17 are admitted. I assume there is no objection.

MR. WHITE: No objection, your Honor.

THE COURT: All right.

BY MR. CORCORAN:

Q Can you quickly go through that? Explain why you gave that to us.

A I gave it to you this morning. You have written 16 on top of it.

Q I'm sorry. It's 17.

A I gave this to you this morning. It's also got a letter that I wrote to you and Mr. White. Contained in this exhibit is the State's petition and fee voucher for Mr. Madale Johnson, I think is the way he said his name. Mr. Johnson was on deferred adjudication for robbery and had a misdemeanor offense. Mr. Tyson Murty was the same situation. He was on deferred adjudication for robbery

and had a new DWI offense, and those particular pages will show in Mr. Johnson's case he was offered five years by Judge Gill, and he accepted the offer that day. So we didn't have a hearing for him. Mr. Johnson was also offered seven years. He was on probation for robbery, had a new DWI, and he had an offer on that day and received a seven-year sentence.

Then I provided another one of these tracking sheets which is on the top of Exhibit 16. It's a similar sheet. This is one for December 18, which of course has Ms. Wilson's name on it as well as other persons, and it's just another illustration of how many cases were done in that court and who their lawyers were.

The next page is date 12-12-06, and this is the document I mentioned to you a minute ago that I saw that I thought was made in the jail.

But if I billed for appearance that would have to have been in the court where I saw Ms. Wilson and at least four other persons. That's when she told me that Reggie Johnson -- which is the person that testified that had already been convicted of the offense -- that he would say it was all his drugs and his doing. That's where I located him. His county ID and his lawyer's number are on that list. And that is where I found it. It may have been that we were going to have that hearing that day, but

she would have been in the hospital. I don't remember. That wouldn't be accurate. I would have talked to her. Maybe she told me the witness' name, and we reset it. We would have had some conversation that day about her giving me that name.

Then the next page is my printout from my office schedule for December 14 which just shows the list of cases set that day as well as December 18 which would have been one of the last days of the year for Judge Gill's court.

The following page is Ms. Wilson's, and it's actually two pages of her county case list which shows the cases she had and the dispositions. On the right-hand side I looked up on the county computer to see what sentences she got prior to my representing her, and on the next page it includes her delivery case which at the time was not disposed of. It was dismissed January 8th of 2007, and in the last page is the specific case printout for her deferred adjudication case, the one she got revoked on and sentenced to fifteen years.

Q The new offense was dismissed after --

A Judge Gill found that not to be true, and they would probably have dismissed it anyway. She had already been revoked and sent to the penitentiary. Typically what if the DA's office would do is if the person said it was

not true and they were going to have prove it at trial, they would dismiss it. They may have dismissed it or because arguably they were estopped from arguing -- collateral estoppel is what I'm saying.

Q One last question. Did she manifest that you defend the case a certain way?

A She wanted Reggie brought to court. She was specific about that. I would not have hunted him down or had him brought to court had she not said something about it.

MR. CORCORAN: Your Honor, pass the witness.

THE COURT: Do you have any questions?

MR. WHITE: Yes, your Honor.

THE COURT: Okay, while you are getting up there, let me ask a question or two.

Say she told you she had mental problems. You told us one of the things you would have done is told the judge, and he probably would have appointed somebody to examine her.

THE WITNESS: He would have.

THE COURT: Would you have done anything else such as trying to get an evaluation?

THE WITNESS: It would have been depended on the case. If she said all the things she said here, I would have got a psychologist and have gotten the records, and

he would have called me and said this is the situation, and depending on the nature of it, we might or might not have done that. And those records are relatively easy to get, Tarrant County MHMR.

THE COURT: Would they also be at Peter Smith?

THE WITNESS: Sometimes they are, and sometimes they are not. If you break your leg in the jail, they are going to take you to Peter Smith. But the Sheriff's Department, MHMR or Peter Smith.

THE COURT: What would likely have happened if it was concluded that she had bad problems that could have explained why she didn't report?

THE WITNESS: We would have had a hearing, and if she had some reason to not have reported -- that might have gone along with that -- Judge Gill would have done that. She testified that her house burned.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. WHITE:

Q You are aware of the difference between competency and mitigation evidence, right?

A Yes.

Q What is the difference?

A Competency means whether or not you have a rational and factual understanding of the proceedings

against you and whether or not you can communicate and discuss those matters with your lawyer. Mitigation would be to lessen the punishment, if any.

Q And I know we have talked a lot about her competency. Let's talk a little bit more about her mitigation. In your experience with Judge Gill, does he make every effort to follow the law?

A I would say so.

Q And you understand -- How long have you been practicing law?

A November of 1985 so twenty-four years in November.

Q And you understand that a judge has to consider what evidence you put on as the lawyer in a criminal defense case?

A That's correct.

Q And if you put on mitigation evidence, that's something the judge many have to consider?

A That's correct.

Q Now, you have also shown us some different examples of what Judge Gill would do in various cases that you have handled before him.

A That's correct.

Q Do you recall if any of these people had mental health and mental retardation issues that Ms. Wilson had?

A I don't believe any of them were mentally retarded. Penny McGee had kind of a hard time. He didn't like the offer that Judge Gill made him, and that happened a lot in these kinds of cases. None of those people were incompetent.

Steven Eaton had some issues with drug usage that affected his ability to do probation, but none of them incompetent, and none of them mentally retarded, and none of them that would have the similar restriction that Ms. Wilson described today.

Q And some of the restriction that Ms. Wilson described today, would you in your training and experience describe that as potentially mitigating evidence?

A I would think it would be. I was not aware of that situation, and if I had been, we might have done that. Her primary focus was I didn't do this. The other guy sold the dope, and that's what we showed.

Q Now, at a revocation hearing there is at least two parts. The first part is are the allegations true, correct?

A Yes.

Q And what is the second part?

A To decide the punishment. It basically follows the track of a jury trial.

Q So in that second part is where a criminal

defense lawyer would put on any explanation for the violations?

A That's correct.

Q That's where you would have put on mitigation evidence had you known about it?

A Sort of. Given the fact that she testified at the hearing, many times what would happen is people would testify about those things at what I am going to call the guilt-or-innocence stage of the hearing. Didn't always happen as cut and dried as you mentioned.

Q Prior to the hearing, what was your understanding of why Ms. Wilson did not report as alleged in the petition?

A I can't remember specifically what she told me. Seems like she told me about the issue of the fire. It was a house that burned up, and I think some of her relatives were killed.

Q And would you consider that to be mitigation evidence as to why someone would not report?

A I don't think -- It wasn't going to get her out of a violation. And I don't mean to be crass about it, but it wasn't going to make a lot of difference to Judge Gill because she missed more than one reporting. The way he saw it is the fire happened on Day 1, what did you do the other twenty-nine days of the month? He would never

have said that, but that's where he would have been coming from.

Q Did you do any investigation into the fire situation she told you about?

A No.

Q Did you do any investigation into her mental health issues?

A No.

Q Mental retardation issues?

A No.

Q You saw that she had on a collar at the hearing?

THE COURT: He said he didn't remember.

BY MR. WHITE:

Q When you go to the jail to visit someone, you have to fill out a little orange card. Is that right?

A Yes.

Q And what is the purpose of that card?

A The jail keeps it so there is a record of who went to see a person in jail.

Q And when they went to see them?

A That's right.

Q Go to 321 of Exhibit 1?

A Okay.

Q Tell me what that is.

A That is a jail visitation card for Sandra Wilson

that I filled out. Everything -- the floor, the date of birth, the number above Wilson, her last name, is going to be her county ID number. I don't believe that's my handwriting. I wrote "Atty" which means representing her as an attorney. The purpose was a legal visit in the attorney's booth. And my signature and my printed name. And I would have written the date which would have been December 12 of 2006 and the approving authority and time in would be written in by whoever was working at the jail.

Q Would that cause you to believe that you visited her in the jail in December of 2006?

A That's right.

Q You testified about some handwritten notes. I believe it was Exhibit 17 dealing with 12-12-06, Page 12 or 13.

A It's 17-12.

Q Looking at that exhibit, you have some notes there relating to Sandra Wilson, and it also says 12-12-06?

A That's correct.

Q Coupling that with Page 321 out of Exhibit 1, wouldn't it be fair to assume that you went to the jail to visit her on 12-12-06?

A I believe that's correct.

Q And in fact, she had on that collar when you

went to visit her?

A She could have very well.

Q Did you ask her about it?

A I don't remember if she had it on or not. If she had it on, I saw it. I just don't remember it. I'm not calling her a liar. I just don't remember.

THE COURT: What does chronic mean?

THE WITNESS: I looked at that, and I thought she told me it was a chronic drug user.

THE COURT: Codefendant SM.

THE WITNESS: That's say, codefendant will say she had nothing to do with it.

THE COURT: And she told you that on December 12?

THE WITNESS: That's correct. It was that day or some day before that because I had to figure out where he was.

THE COURT: It looks like you have his name and phone number or --

THE WITNESS: No, county ID number. That's a number you get when you go to the jail. It stays with you every time you come down there. The other number is going to be his case number I believe, and Fred Cummings was his lawyer who was underneath that. Ultimately, I wouldn't have gotten all of that information from her because she

wouldn't have known it, but I had to track down where he was and get him bench-warranted back or get Judge Gill to keep him in the jail. And I checked the file, and there wasn't a bench warrant. So I would have done the other.

BY MR. WHITE:

Q I also want to refer your attention to Exhibit 1, Page 322. That's one of those jail cards?

A Yes, sir.

Q And what date on that?

A January 2, 2007.

Q And you went to visit her on that day?

A I went to visit her on that day.

Q Did she have on the collar?

A I don't remember.

Q She did have on the collar on the 5th?

THE COURT: I think he told us several times he doesn't recall ever seeing her in the collar. Let's don't keep asking that question if he has already answered it.

BY MR. WHITE:

Q Let's start with Exhibit 12. That's the paperwork for Ms. Wilson?

A That's her petition to proceed to adjudication, yes, sir.

Q Do you know why she did not report on August 21st?

18:00

A I read the record and -- I'm talking about the record of the hearing. Ms. Latham, who was the probation officer, had testified in that hearing that Ms. Wilson was told to report. Ms. Wilson had told me that she did report because she pled not true to that. However, Ms. Latham had a document Ms. Wilson had signed that ordered her to report. I don't have a document. I don't remember why she didn't report, to answer your question.

Q What about September 2006?

A She had indicated that there was a fire at her residence or a relative's residence.

Q That would have been the same for October 2006?

A I think that's correct. The record where she testified would have been a much more accurate reason, but specifically what she told about not reporting I don't remember other than what she would have testified to.

18:00

Q Going to Exhibit 13, Mr. Eaton ultimately gets twelve years, right?

A He ultimately got sixteen. His offer was twelve.

THE COURT: Did he contest his?

THE WITNESS: He did that in final hearing, yes, sir.

BY MR. WHITE:

Q What was the result of the finding of his new

offense? Did Judge Gill find that true or not true?

A I don't remember. If I remember correctly, he had another lawyer representing him on that case. You talking about the drug offense? I think he had another lawyer, and I want to say dismissed, but I don't know.

Q If I were to show you the county computer print-off concerning Mr. Eaton, would that refresh your recollection as to the result of that new offense?

A It would. And I could be wrong in what I just said.

THE COURT: Just read it and tell me.

MR. WHITE: That Mr. Eaton was convicted of a crime of burglary of a habitation. The offense date of the crime was January 5th of 2007 as alleged in this petition to adjudicate.

THE COURT: He was convicted of that offense in a different case?

MR. WHITE: Yes, in a different cause number.

THE COURT: Can you accept that?

THE WITNESS: Sure. That could be, sure.

BY MR. WHITE:

Q Going on to 14, Henry Ogle, what was the result of his new offense?

A I don't know.

Q Do you know if he contested his hearing or not?

A I believe that he settled his case on the eve of the hearing. What I mean by that is Judge Gill would leave his offer open, and if the person came in even on the day of the hearing they could settle for it at that time. I think that's what happened in this case.

Q And Number 15, Mr. Penny McGee, what was the result of his new offense? True or not true?

A You mean the new offense that was alleged in this petition?

Q Yes, sir.

A Are you asking what happened on that day?

Q Not so much the facts. Did Judge Gill find it true or not true?

A He found it true.

Q And ultimately sentenced him?

A He found the new offense true and sentenced him on the aggravated assault revocation.

Q Now, Exhibits 13, 14, 15 are examples that you testified on direct about what Judge Gill would do in certain types of cases.

THE COURT: I think that's what he said they are.

THE WITNESS: Yes, sir.

THE COURT: What's the difference between these cases and Ms. Wilson's case?

A In her mind -- And I think probably in Judge Gill's mind -- probably nothing.

BY MR. WHITE:

Q Isn't it true that in these cases -- 13, 14, 15 even some of the others -- the new offense was found to be true?

A That's the difference, yes, sir.

Q But in Ms. Wilson's case the new offense was found to be not true?

A Yes, sir.

Q And you testified earlier that Judge Gill's offer depends in part on the new offense?

A That's correct.

Q But the new offense here was not true?

A He found it not true.

THE COURT: Where is this line of questioning leading us as far as this procedure is concerned? You may be showing that Judge Gill's sentencing scheme is not a very good one, but I don't know that that's in issue.

MR. WHITE: Well, your Honor, one of the things we have to establish is prejudice. Here is what Judge Gill would have done, and here is examples of what he would have done and use these examples of typically what he would have done. I have to show the difference between Ms. Wilson's case and these cases.

18:00

THE COURT: Are you going to show in these other cases that there was some type of evidence about somebody having a mental problem that would explain why he did something different in those cases? I don't understand where you are heading.

MR. WHITE: It goes to prejudice. It shows that the evidence they are saying shows no prejudice is distinct from the evidence in this case.

THE COURT: So you are showing their evidence of no prejudice isn't very good?

MR. WHITE: Yes, essentially, your Honor.

THE COURT: I understand what you are doing.

BY MR. WHITE:

Q You testified earlier that you go back to Judge Gill's offers, and he would have the offer written on the probation file?

A Yes.

Q And did you review Ms. Wilson's probation file?

A Yes.

Q And what do you recall was in it?

A It would have -- In her particular case, as I remember it, it wouldn't have been a very thick file because they hadn't seen her since she got put on probation. In other words, it would have the judgment and sentence of putting her on probation, a copy of the

conditions of probation. If a person reported, those are forms would be in there. Since she didn't report, they weren't there. I don't know that I looked in this in this case. It would have a copy of the offense report for the robbery that she was on probation for. It would have a copy of any referrals that they might have sent her to. I believe it had a copy of the document I mentioned a moment ago that Ms. Latham, who was the probation officer, directed Ms. Wilson to her office on the 1st of August. That would have been in the file.

THE COURT: Do we have any of this material about the conditions?

MR. WHITE: No, your Honor, I don't think so.

BY MR. WHITE:

Q Do you recall there being anything in there concerning her mental retardation and mental health issues?

A I don't recall.

Q So there is no way a judge would have known about it other than you presenting it?

A If it wasn't in there.

THE COURT: We do have that in the record because it's part of the state record that's now part of this record. Does anybody happen to have that in front of them -- Well, I do have.

MR. CORCORAN: It's not large, your Honor. It's on Page 30. There are three volumes to her first habeas application and conditions of supervision.

THE COURT: Let me see that. You are saying there is no condition about mental health?

MR. CORCORAN: I didn't read it fully.

THE COURT: Are these conditions all pretty much standard, just a printed form?

THE WITNESS: Pretty much. Unless there is a sex offender, they got another form. But everybody gets the form you are looking at.

THE COURT: What I'm looking at is Pages 30 and 31 of the State habeas records. One of the conditions is psychological evaluation and treatment. Project Safer Neighborhood, whatever that is, and evaluation and testing and treatment for substance abuse. Makes you wonder about the Probation Office. I'm handing this back.

MR. WHITE: Proceed, your Honor?

THE COURT: Go ahead.

BY BY MR. WHITE:

Q What type of sentencing options did Judge Gill have? Other than sending her to the penitentiary, what else could he have done?

A Put her back on probation. Given her some time in jail. He could have referred her -- If the evidence

had supported it and he wanted to, he could have sent her to any number of a drug treatment classes. He could have amended her probation to a more stringent probation, made her report more often, made her go to a residential treatment center. He could have put her on a MHMR case load. Put her on regular probation. If she was physically healthy, he could have sent her to boot camp. A number of things.

THE COURT: Compared to what you have seen in other cases, what is the level of severity of the sentence he imposed on her.

THE WITNESS: It's about the same.

THE COURT: It sounds like he has a fixed routine without taking into account the characteristics of the individuals.

THE WITNESS: He's pretty predictable. And if I could elaborate, she had been to the penitentiary about three times before she got this probation. I don't know if he looked at that document or not. That's the last couple of pages of her case listing. He may have seen that and decided she got plenty of chances. It's not unheard of, but pretty unique.

BY MR. WHITE:

Q In that vein of thought, you testified about a twelve- to fifteen-year range is what Judge Gill would

typically do where there is a second offense?

A If they are on probation, it would be different because you couldn't give them over ten years, but if they were deferred and they had a new felony offense, the offer was almost always twelve years, and if they got revoked, they would get fifteen years.

Q The five- to seven-year range, you said that was for technical violations?

A That would be for failure to report. Like not going to do an assessment which would be a violation. But technical violations, yes, sir.

Q And that was ultimately what Ms. Wilson got revoked for?

THE COURT: I think we're beginning to go over the same things again.

MR. WHITE: Yes, your Honor. In light of that other line of questioning, I just wanted -- May I have a moment with counsel?

BY MR. WHITE:

Q In your twenty plus years of practice of law, you are familiar with the Code of Criminal Procedure?

A Yes.

Q And are you familiar with Article 4212 of the Code of Criminal Procedure?

A I try to be. I don't know that I can tell you

18:00 everything that's in it.

Q It's basically the article that deals with probation. Deals with what it takes to get on probation, revoke probation, things of that nature, right?

A That's right.

Q Are you familiar with Section 9 of Article 4212?

A I would have to see it. I have read the statute, but I don't know specifically what point that makes.

THE COURT: What does it say?

MR. WHITE: It's a little wordy, but it essentially deals with a mandatory mental health evaluation if it's brought to the Court's attention. If the Court notices it on its own or brought to the Court's attention through the lawyers or any other parties involved.

THE COURT: What's the purpose of the evaluation? To see if the person knows what they are doing at the hearing or does it have some other purpose?

MR. WHITE: It could be used in sentencing, in what to do with this person while he's on probation, what to do with this person if they violate probation.

THE COURT: Let me see it. Which Subsection?

MR. WHITE: 9 Subsection (i), your Honor.

THE COURT: That has to do with a presentence

investigation to be conducted in connection with these revocation proceedings?

THE WITNESS: Not that I am aware of. I think it would have been done at the time she was placed on probation.

THE COURT: When?

THE WITNESS: Back in August of 2006.

THE COURT: Do you know if that applies to this kind of felony?

MR. WHITE: The point is that it could be done.

THE COURT: Well, I think he's already said they would have done it had they called her condition to the attention of the judge, if he had known about it. Isn't that what you said earlier?

THE WITNESS: Yes, sir.

THE COURT: He's not taking issue with that. He's saying he knows they would have done it.

MR. WHITE: I want to bring to the attention the Court it is a mandatory provision. It goes to the prejudice.

THE COURT: Well, his impression is this applies only at the time the defendant pleads guilty. Is that what you are saying?

THE WITNESS: Well, maybe I misspoke. That's generally when it's done. If you have a situation where

that might become applicable at a revocation, it could be. But typically that's done when a person is first put on probation. That doesn't keep me from saying something to Judge Gill.

THE COURT: Well, I'm assuming what you said, that he would have done it.

THE WITNESS: That's correct.

THE COURT: Well, I'm trying to decide if this article has anything to do with our case. But I will take it into account. I'll hand this back to you.

MR. WHITE: Pass the witness, your Honor.

THE COURT: Do you have any other questions?

MR. CORCORAN: Maybe four questions is what I have.

18:00 THE COURT: All right.

REDIRECT EXAMINATION

BY MR. CORCORAN:

Q The first question is you were asked about the difference between the cases --

THE COURT: That's a statement. Ask a question. I haven't given you time for statements.

BY MR. CORCORAN:

Q Why do you think Judge Gill sentenced her in the range as if he found the new offense true?

MR. WHITE: Objection.

THE COURT: Overruled.

A Well, he found that allegation not true because of the technical failure of the State to prove what they changed their allegation to. When they changed it from actual to constructive, that changed the pleading. It actually added an element to what they had to prove. He found it not true because of that, not because he didn't think she was there and committed the offense. That's my opinion. I went and asked him since I got notice of doing all of this. He and I talked about this two weeks ago, and that's the impression I had from him as to why he had done it.

MR. WHITE: Objection, hearsay.

THE COURT: You talked to Judge Gill about this case?

THE WITNESS: I went and talked to him, and I specifically told him the case I represented someone on was having a hearing in your court today. Here is what happened in this case, and here is what I'm thinking you did, and do you agree or not agree with it. That was the conversation. I don't know that I told him Ms. Wilson's name.

THE COURT: Did he agree that he probably took that offense into account?

THE WITNESS: He didn't say that, and I didn't

specifically ask him. I asked him why he found it not to be true.

I asked when you amend your pleadings from actual to constructive, did that add an element, and the research I had done and was aware of, that's what happened. He took a break to go do some research. And I said you took a break. Why did you do that? And he said I went to go look something up is what he told me.

BY MR. CORCORAN:

Q In the Criminal Code of Procedure, the number of instances where the jail may be required -- or the State may be required to deal with a mentally retarded person, were any of those signs in this process with Ms. Wilson? What are those signs? What kind of things would you see if you believed this person to be mentally retarded?

A There would be things in her file typically. She would have had a referral to some psychologist arguably. There may have been a note or some pleadings that some lawyer filed previously. Any one of a number of things. As innocent as the bailiff telling you, "Hey, your guy has something matter with him."

THE COURT: What kind of a file are you talking about?

THE WITNESS: The clerk's file that I might have looked at or the probation file. It could be in a variety

of places. But it mostly starts when I have a conversation with the client.

THE COURT: Well, you have seen Ms. Wilson here today. Do you remember if she acted the same way then that she acted on the witness stand when you represented her?

THE WITNESS: I believe when we had the hearing and I knew her in 2006-2007 she feels a little more verbose about her statements. Can I say she wasn't mentally retarded, no, I can't say that. I don't know. I just didn't have any indication of it.

BY MR. CORCORAN:

Q Would there have been any reason not to raise a mental retardation issue had you known about it in this case?

A No, not at all. If I thought for a second she was incompetent, I would have told Judge Gill, and she would have been sent to a psychiatrist and interviewed, and they would have made a recommendation. It would have been one less thing for me to do.

Q What about mental retardation? If you had become aware after finding or testing -- Forget competency for a moment. Would that have been something you would have immediately brought to Judge Gill's attention?

A It could have made a difference. And I probably

would have.

THE COURT: What about telling him she had a neck brace on because she was recovering from a suicide attempt?

THE WITNESS: I don't know that that would have made a lot of difference.

THE COURT: Would that in all probability have invoked further inquiry into what her mental condition was?

THE WITNESS: It could have or might not. From what you just said, probably not.

BY MR. CORCORAN:

Q And finally, with respect to mental illness, is there anything in your understanding of Judge Gill in terms of how you strategize in a case, if you assumed a mentally ill person, would that have mattered with Judge Gill?

A I guess the best way to answer this is to say he was going to make some inquiry as to whether the person was guilty or not guilty or violated their probation, and that had an awful lot to do with what he did. And going back to the issue of constructive versus actual transfer, I don't think there was a doubt in his mind in doing that because those police officers testified she was right in the middle.

MR. WHITE: Objection. Speculation.

THE COURT: I am going to receive it for whatever it's worth. I think you have told me that you thought there was some mental illness there would have been an inquiry.

THE WITNESS: Might have depending on the result. He would have at least made the inquiry.

THE COURT: He would have done something different in the sense that he would have had a psychiatric evaluation.

THE WITNESS: I think that's correct, yes, sir.

BY MR. CORCORAN:

Q And some judge might find aggravating that a person does not take their prescription medication while on probation. Is Judge Gill that kind of judge?

MR. WHITE: Objection, speculation.

THE COURT: I think he can say that without speculating. What kind of a judge is he?

THE WITNESS: He's not very forgiving when people don't do what they are supposed to, and if you are ordered by a doctor or a judge to take your medicine -- and a lot of people don't do it that I come across in this business -- he didn't have a lot of sympathy for that.

MR. CORCORAN: Pass the witness.

THE COURT: Did you have anymore questions?

MR. WHITE: No, your Honor.

THE COURT: Okay. You can step down. May he be excused?

MR. WHITE: Yes, your Honor.

THE COURT: Did you have any rebuttal?

MR. WHITE: No, your Honor.

THE COURT: You may step down, and you are excused.

MR. WHITE: Your Honor, we would request a brief summation.

THE COURT: Okay. That's fine.

MR. WHITE: Your Honor, I want to make sure that we're talking about the issue here not being competency. The issue is whether or not Mr. Ray had a duty to investigate and present mitigating evidence in the sentencing phase of her trial. That duty only kicks in when he has notice. What do we have concerning his notice? One, she tells him in no uncertain terms. She said she tells him on a couple of different occasions. The other thing we have -- while he may not recall it's clearly in the records, both the medical records and testimony from court -- that the client has on this big neck collar. He's got to ask. What happened? Why do you have on a neck collar? That would have prompted further investigation.

THE COURT: Let me ask you this. I haven't studied all of these exhibits in detail. Is it clear that she had the neck collar on because of the injuries she suffered from the suicide attempt in the records?

MR. WHITE: That's what the medical records indicate.

THE COURT: Do you agree with that?

MR. CORCORAN: I don't know that they say it was done to prevent her from doing another suicide.

THE COURT: No, I'm talking about it was treatment for an inquiry from committing suicide.

MR. CORCORAN: Correct. She was prescribed the neck brace after that suicide attempt.

THE COURT: Well, I do have a lot of concern that he didn't ask her about that. When did she put the neck brace on?

MR. WHITE: She got out of the hospital on the 6th or 7th of 2006, and he goes to visit her on the 12th of December of 2006 in the jail. And she says she has the collar on on the December 12 jail visit, and the transcript in the jail hearing indicates she has on the collar. There is at least two occasions where she has on the collar.

THE COURT: Well, I don't have any hesitancy that he should have asked her why she had that collar on.

I don't have any hesitancy that if he asked her he would have had an obligation to inquire further and he would have discovered that she had a bad mental problem. Let's start with that. I'll make those findings.

MR. WHITE: Then that brings us to Ransome, your Honor. It essentially says when counsel is on notice of potential mitigating evidence counsel is no longer justified in relying exclusively on the defendant for information.

THE COURT: Well, I assumed he got the information from the defendant. She told him why she had the collar on. I find that she would have told him if he asked her. I'm finding if he had done his job, he would have found out from her what the problem was. He wouldn't have to go somewhere else. He could have amplified on his state of knowledge by getting the jail records. I assume the jail records would show the suicide attempt.

MR. WHITE: Yes.

THE COURT: Did the jail records show that she has mental problems?

MR. WHITE: The jail records make an indication within the medical records by JPS.

THE COURT: She was sent there for the suicide attempt?

MR. WHITE: Yes, your Honor.

THE COURT: And those records would have showed her mental problems?

MR. WHITE: Yes, sir.

THE COURT: As far as I'm concerned he was on notice of those things because if he had made a proper inquiry, he would have learned of those things. Where does that take it?

MR. WHITE: That brings us to prejudice. Was she prejudiced by his failure to investigate and present mitigating evidence. And what did she ultimately get revoked for? For not reporting on those three occasions listed in the petition. Mr. Ray testified that in situations where the new offense is not found to be true, Judge Gill's range goes down to five to seven. He said five to seven one time and four to eight one time. But that's considerably lower than what she got. We speculated a lot on why the new offense was found not to be true. But the speculation could go the other way. It could be that he did not believe she was involved in the offense. The state could have changed their pleadings right before the hearing because they felt like they had a weak case as it was alleged. We can speculate all day. But what we have clearly is she was revoked for not reporting. She had some mental health issues, some retardation issues, and those were potential evidence as

18:00 to why she didn't report on those three occasions. And that brings me to the Wiggins case, 539 US 510. Most specifically here in assessing prejudice we reweigh the evidence in aggravation against the totality of available mitigating evidence. The other side makes the point if she wasn't taking her medication is that something Gill would have considered potential aggravating. I'll concede that. Maybe he did. Maybe he wouldn't have. But Wiggins also stands for the proposition that we have to take into totality of available mitigating evidence, and that would have been her mental health condition going back as far as 1999 that was available and would all of that have gone a long way in explaining why she didn't report. The records and exhibits she has also indicate when she self reports to mental personnel and jail personnel -- why didn't you report during this time -- I was homeless, off my medicines, walking the streets, eating out of trash cans.

THE COURT: She said because the house was burned down.

MR. WHITE: That's what she testified to today, but there are exhibits that indicate additional reasons why she would not have been reporting. And that is potentially mitigating evidence. It might not have been to assess a drug charge, but it would have been mitigating to assess why she didn't report.

18:00

THE COURT: Well, how do you justify that she didn't pay a lot of attention to those things.

MR. WHITE: Does that excuse the lawyer from doing his job?

THE COURT: No, but I have to be convinced it would make a difference. I have some concern that with that judge it really wouldn't have made any difference. It occurs to me as a possibility.

MR. WHITE: I can understand that, your Honor. That's why I bring up Article 4212 of the Code of Criminal Procedure, and if that is brought to the Court's attention the court shall -- that's mandatory language.

THE COURT: Let me say one other thing, and I can find based on what I have heard that her mental illness had been made on the record as a result of knowledge of the suicide attempt, that had the judge been made aware of those things he would have ordered her to be evaluated by a psychiatrist or psychologist to determine what her mental condition was. I think that's undisputed from what Mr. Ray says. Where does that leave us? What would he was done when you got the results?

MR. WHITE: By law he would have considered the information.

THE COURT: Well, we have heard it really didn't make a lot of difference. He has a certain number of

years he's going to give the people, and he doesn't pay a lot of attention to things we're talking about.

MR. WHITE: We also heard he had arraigned for new offenses and another one for technical violations.

THE COURT: Apparently he didn't pay any attention to the two ranges in this case, and I don't see how knowing her condition would have changed that.

MR. WHITE: I understand the question that you are asking. I think Wiggins, the case that I cited earlier, says now is the time for you to assess the aggravating and the totality of available mitigation evidence, and now is when you have to make that determination.

THE COURT: I don't think I can decide what sentence should be imposed. That's not my job. I think what Judge Gill did is outrageous, but I don't know that's my job to make that evaluation.

MR. WHITE: There is several ways to define --

THE COURT: In my view what he did is outrageous, not considering her mental condition or retardation.

MR. WHITE: What he did also forecloses her ability to appeal her sentence based upon this information. There is no record of it at the trial court. Therefore, she couldn't appeal it.

THE COURT: Okay. Let's assume that she did not receive legal representation, that she was denied her Constitutional right to have adequate legal representation. That's just a starting point. The question was should I be hearing this hearing, period. I'm sure I am going to hear about that, whether she was entitled to a hearing. 2254(e)(2) says "If the applicant has failed to develop the factual basis of a claim in State proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that. (ii) a factual predicate could not have previously been discovered through the exercise of due diligence.

I don't think that's applicable. And the (B) part would be facts to be sufficient to establish by clear and convincing evidence that but for the Constitutional error -- I'm not sure that's applicable -- that no reasonable factfinder could find her guilty of failure to report. Those are the different parts. The hard part is getting around the (d) and (e) parts of 2254.

MR. WHITE: And in light of our phone conference I thought that was going to be the thrust of the post-hearing briefing.

THE COURT: Well, if you want to do some post-hearing briefing, I will need some help. Frankly, I think your client should be released and have a hearing

before a different judge if he is no longer there. But I'm not sure how I'm getting there. Do you have any suggestions?

MR. CORCORAN: No, your Honor, you are absolutely right about 2254(e)(2) and (d) make it difficult for us to get here. I would like to address that post-hearing briefing.

THE COURT: You all together share the cost of this record so that I will have a record, and if you can't agree to the extent of anything that happened here, you will have a record to give me a reference to.

MR. WHITE: Your Honor, if I may? By no means am I an expert in post-conviction litigation. Both Ms. Walker and myself are anxious to do the best we can. However, we would at a minimum ask for an extended period of time because we are catching up with regard to the basics of post-conviction litigation.

THE COURT: I thought you had become an expert in this case, and I can appoint you again.

MR. WHITE: Well, I'm trying, but it's not what do on a daily basis.

THE COURT: And they will help you. They will cite some cases you will think about that.

MR. WHITE: I just might need a little extra time.

18:00

THE COURT: How much time?

MR. WHITE: Your Honor, honestly I think I need a month.

THE COURT: Okay. Thirty days after the court reporter has prepared to file the record. She's filling in for my court reporter, and I'm sure she has a lot of other things to do. I take it both of you are ordering a record to share equally in the cost. So I'll give you each thirty days after the record is received for the post-hearing memorandum, and when I see those, I'll decide whether I am going to give each one of you an opportunity to respond to the other. We have been down this road before in another case, and that is when it is so apparent there is a miscarriage of justice to do it another way than this. To me, it's apparent in this case there has been a miscarriage of justice. Are you ware of any other way to get this done?

MR. CORCORAN: I'm not aware of any other way. You cited the statute. "The court shall not hold an evidentiary hearing." It's very difficult to get around these issues.

THE COURT: Well, you don't want to get to hung on technicalities when there is a miscarriage of justice.

MR. CORCORAN: Well, your Honor, I think it's a valid defense, and it's a Congressional mandate.

THE COURT: Well, if we have to go through it we will, and it may be that Ms. Wilson simply can't get relief. If there is a way I can give it to her, I am going to. But this is not as clear cut as the last one that your cocounsel was in.

MS. CALLAGHAN: No, your Honor, I was in Hamm.

THE COURT: Not Richards? Well, this case is almost as clear cut a miscarriage of justice as Richards. Okay. Anything else we need to do today?

MR. CORCORAN: Not from me, your Honor.

MR. WHITE: Not from me. Let me ask you one other thing. What if she was not sentenced to a term of imprisonment? Where could she have gone?

MR. WHITE: It's wide open. He could have made her go to mental health counseling, in-patient mental health, Vernon State Hospital. It's wide open. She could have been on probation technically while in the state hospital.

THE COURT: Okay. You all are excused.

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C E R T I F I C A T I O N

I, Cassidi L. Casey, certify that during the proceedings of the foregoing-styled and -numbered cause, I was the official reporter and took in stenotypy such proceedings and have transcribed the same as shown by the above and foregoing pages 1 through 103 and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

s/Cassidi L. Casey

CASSIDI L. CASEY
UNITED STATES DISTRICT REPORTER
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
CSR NUMBER 1703

EXHIBIT 40

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SANDRA WILSON,	§	
	§	
Applicant,	§	
	§	
VS.	§	NO. 4:07-CV-708-A
	§	
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION
and
ORDER

After having considered the relief sought by applicant, Sandra Wilson,[1] in the application she filed December 10, 2007, for relief under 28 U.S.C. § 2254, as supplemented by her post-hearing filing, the court has concluded that the application should be granted for the reasons given below.

I.

Procedural History Leading to the Hearing Conducted by This Court

On August 18, 2006, applicant entered a plea of guilty to the offense of robbery in Case No. 1032954W in the District Court

[1]The title of the document filed December 10, 2007, by Sandra Wilson was "Petition for Writ of Habeas Corpus by a Person in State Custody," and she referred to herself as "petitioner" in the document. Consistent with the wording of 28 U.S.C. § 2254, the court is referring to the document as an "application" and is referring to Sandra Wilson as "applicant."

of Tarrant County, Texas, 213th Judicial District. As authorized by section 5 of article 42.12 of the Texas Code of Criminal Procedure, there was not an adjudication of guilt, but applicant was placed on community supervision for five years. Thereafter, on November 13, 2006, the State filed a petition to proceed to adjudication of guilt and sentencing based on applicant's allegedly having violated her conditions of supervision by engaging in an illegal controlled substance transaction on November 7, 2006, and failing to report to her Supervising Officer on or about August 21, 2006, and during the months of September and October 2006. Bill Ray ("Ray") was appointed by the state court trial judge to represent applicant in defense of the petition to proceed. A hearing was held on the petition on January 5, 2007.

At the conclusion of the hearing the state court judge found that applicant had committed the failure to report violations, but that the alleged controlled substance offense violation was not true. The judge then adjudicated applicant guilty of the robbery offense to which she pleaded guilty on August 18, 2006. After giving counsel for both sides an opportunity to offer argument and evidence at the punishment phase, the judge

sentenced applicant to a term of imprisonment of fifteen years. Applicant did not appeal the August 18, 2006, judgment placing her on deferred adjudication community supervision or the January 5, 2007, judgment adjudicating her guilt and imposing the sentence.

On August 2, 2007, applicant attempted to file a state application for writ of habeas corpus, challenging the adjudication proceeding, which was dismissed September 12, 2007, by the Court of Criminal Appeals of Texas for non-compliance with a form requirement. Then, on October 8, 2007, applicant filed a second state application, this time challenging her original plea of guilty, the adjudication proceeding, and her sentence. The second application was denied without written order by the Court of Criminal Appeals on December 12, 2007.

The application now under consideration was docketed November 20, 2007, by virtue of the filing by applicant on that date of a document misnamed "Notice of Appeal" together with a motion for leave to proceed in forma pauperis. Applicant's "Petition for Writ of Habeas Corpus by Person in State Custody" was filed December 10, 2007.

On November 17, 2008, United States Magistrate Judge Charles Bleil issued his proposed findings and conclusions and recommendation. He recommended that applicant's grounds for relief related to her plea of guilty proceeding be dismissed as time-barred, and that her remaining grounds, including the grounds that she was denied constitutional due process and effective assistance of counsel, be denied. Applicant timely filed on November 24, 2008, objections to the magistrate judge's proposed findings and conclusions and recommendation.

By order signed December 4, 2008, the court accepted the magistrate judge's findings and conclusions and recommendation as to all but applicant's ineffective-assistance-of-counsel ground; dismissed applicant's claims relating to her original guilty plea and the plea proceeding; and, denied relief based on applicant's claims that her sentence was not fair, that she was convicted because the State suppressed favorable evidence, and that the adjudication proceeding violated her constitutional due process and equal protection rights. The court expressed concern in the order with the failure of Ray to offer any evidence, or otherwise make known to the state court judge, applicant's diminished mental capacity and mental illnesses. Respondent was directed by

the court to file all information in possession of the State consisting of, or pertaining to, any testing, evaluation, or any other documentation bearing on applicant's emotional or mental condition or her intellectual capacity.

Respondent complied with the directive of the December 4 order by filing on January 21, 2009, four volumes of medical and mental health records pertaining to applicant. After reviewing those records, the court concluded that an attorney should be appointed to represent applicant on her ground that she received ineffective assistance of counsel because, according to her claim, her counsel failed to take into account at her revocation hearing, and to make known to the state court judge presiding over the hearing, the various mental problems she was having and her mental shortcomings, including mental retardation. By order signed January 22, 2009, the court appoint Roderick C. White ("White") to represent applicant as to those matters.

II.

The Record of the January 5, 2007, Hearing

The transcript of the January 5, 2007, hearing on the State's petition to proceed to adjudication of guilt and sentencing is Exhibit 3 to the record of the hearing conducted by

this court on May 12, 2009. Five witnesses were called at the very brief hearing. The first two were police officers who gave testimony in support of the drug offense allegation in the State's petition. The third witness was a probation officer who gave testimony in support of the State's allegations of failures to report. Applicant was called by Ray. He developed through applicant that she failed to report because her family (her uncle, auntie, and five-year-old nephew) had just been burned to death in a house fire, and she did not feel like going. Their deaths were in August 2006, and their burial was at the end of August. She denied having engaged in the drug transaction. The final witness, who admittedly was involved in the drug transaction, testified that applicant had nothing to do with the transaction.

During the first phase of the hearing, when the witnesses were called, no mention was made of applicant's suicide attempt, mental illness history, or mental retardation. The only argument made by Ray on applicant's behalf was to urge the judge not to find that applicant committed the drug offense. After having heard the evidence, the state court judge took a short recess.

The entirety of what happened after the judge returned to the bench is set forth below:

THE COURT: Back on the record.

Also based upon the testimony, I find Paragraph 1 of the petition to be not true.

Ms. Wilson, I find you guilty of the offense of robbery causing bodily injury as charged in the felony information in this case. Does either side have anything else they want to offer at the punishment phase?

MR. VASSAR: No.

MR. RAY: No.

THE COURT: I'm going to set your sentence at 15 years' confinement in the Institutional Division.

Counsel, is there any reason sentence should not be pronounced[?]

MR. RAY: No legal reason, Judge.

THE COURT: It will be the Order, Judgment and Decree of this Court that you be sentenced to 15 years' confinement in the Institutional Division and be taken by the sheriff of Tarrant County to the Institutional Division to serve your sentence as required by law.

You have a limited right to appeal, which Mr. Ray can further explain to you.

You will receive credit for the time you have already served in connection with the case that you are entitled to by law.

She's your prisoner, Sheriff:

Ex. 3 at 13.

The drug offense that was alleged in the petition to proceed to adjudication of guilt and sentencing was dismissed on the State's motion on January 8, 2007. Ex. 9.

III.

The Hearing Conducted by This Court

On May 12, 2009, the court conducted a hearing on the application. While the hearing dealt primarily with applicant's ineffective-assistance-of-counsel ground, the court also received evidence pertaining to an unusual procedure the state court judge followed in determining the sentence to be imposed. The following under this heading is a brief summary of the hearing evidence pertinent to those subjects:

A. Jail, Hospital, and Prison Records

Among the exhibits received at the hearing were records of the jail where applicant was confined during the weeks leading up to and immediately after her revocation hearing; records of John Peter Smith Hospital, to which applicant was taken following her suicide attempt on December 2, 2006, while in jail; mental health records pertaining to her care and treatment in the penitentiary unit to which she was sent after her supervised release

revocation on January 5, 2007; and, mental health records of Texas Department of Criminal Justice pertaining to applicant both before and after she was sentenced on January 5, 2007.

The jail records show that applicant tried to commit suicide on December 2, 2006, by hanging herself, Ex. 1 at 81-87, 89-93, and that she was taken to John Peter Smith Hospital for treatment, id. at 81, 92. The records of John Peter Smith Hospital pertaining to applicant's admission there on December 2, not only disclose applicant's December 2 suicide attempt, Ex. 2 at 72, 89, 92, but they also disclose the existence of applicant's mental problems, see e.g., id. at 89 (saying that applicant had "long standing history of mental illness characterized by hallucinations, delusions, and depression"). One of the consulting physicians "strongly recommended psychiatric evaluation & treatment." Id. at 82.

While in the hospital, applicant wrote a letter to one of the doctors informing him that she needed help because she had a "real bad mental problem." Id. at 91. She went on to describe serious sexual assaults she suffered as a child and to relate that she had just lost an uncle, aunt, and five-year-old nephew in a fire. Id. She told the doctor that she needed someone to listen to her because of a need to be put someplace where she

could get help. Id. Hospital personnel recorded that applicant was "hearing voices, seeing snakes." Id. at 89.

Applicant's discharge summary dated December 4, 2006, says that she was discharged wearing a cervical collar, that the hospital staff recommended that she start taking psychiatric medication, and that she was to follow-up with her psychiatrist in the jail following her return to jail. Id. at 9.[2] The parties stipulated to the following facts relative to applicant's suicide attempt and subsequent related events:

> 12-2-06 Suicide Attempt while in Tarrant County Jail. Petitioner subsequently taken to John Peter Smith Hospital where medical records indicate that 1) Petitioner was there from 12-02-06 until 12-07-06, and that during that time, and after medical consultation, she was prescribed psychological medications (including haldol and risperidol); 2) Petitioner self-reported to hospital staff that she had been off of her psychological medications for approximately one year and was not receiving them while in jail; 3) Petitioner self-reported to hospital staff that she was homeless prior to being arrested, and that without her psychological medications, Petitioner claimed to hear voices telling her to kill herself; 4) Petitioner was given a c-collar to wear around her neck, to wear at all times, although Respondent does not concede that she did wear it at all times; 5) JPS Hospital

[2]The jail records disclose that when applicant was returned from the hospital to the jail, she was segregated and put under special observation. Ex. 1 at 294.

> doctors strongly believed that Petitioner should receive psychiatric follow-up, at the Tarrant county [sic] Jail, and; 6) Petitioner was continuously given prescribed medication, as of the date she entered the hospital, and until the January 5, 2007, revocation proceeding.

Joint List of Stipulated Facts at 2.

The records of Texas Department of Criminal Justice show that in the year 2000, applicant was diagnosed as having a schizoaffective disorder, bipolar type,[3] and mild mental

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[3]The diagnostic criteria for schizoaffective disorder, bipolar type, are as follows:

A. An uninterrupted period of illness during which, at some time, there is either a Major Depressive Episode, a Manic Episode, or a Mixed Episode concurrent with symptoms that meet Criterion A for Schizophrenia.

Note: The Major Depressive Episode must include Criterion A1: depressed mood.

B. During the same period of illness, there have been delusions or hallucinations for at least 2 weeks in the absence of prominent mood symptoms.

C. Symptoms that meet criteria for a mood episode are present for a substantial portion of the total duration of the active and residual periods of the illness.

D. The disturbance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition.

(continued...)

retardation, and that she was in the mentally retarded offender program. Ex. 4 at 749-750. Her mental capabilities were summed up in an evaluation made in September 2000, as follows:

> Patient is a thirty-eight-year old black female in MROP with a diagnosis of schizoaffective disorder, bipolar type and mild mental retardation. She reportedly has adaptive behavior deficits of poor academic achievement, history of mental illness, no work history, no responsibility of housing and drug abuse history. Ms. Laney finished the seventh grade in special education and has a 68 IQ score. She has never had a driver's license or bank account. Patient has decreased goal directed behavior since she plans on a daily basis. She was oriented to three spheres and demonstrated concrete thinking patterns. She seemed easily distracted but attended to the tasks of completing the occupational therapy assessment.[4]

Id. at 734.

Her diagnoses in April 2003 again were a schizoaffective disorder and mild mental retardation, with the added diagnosis of posttraumatic stress disorder. Ex. 4 at 724. She was in the mentally retarded offender program at that time. Id. The

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[3](...continued)
Specify type:

> Bipolar Type: if the disturbance includes a Manic or a Mixed Episode (or a Manic or a Mixed Episode and Major Depressive Episodes)

Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 323 (4th ed. text rev. 2000).

[4]During the year 2003 applicant was using the name Sandra Laney.

parties made the following stipulation relative to items in the pre-2005 records of Texas Department of Criminal Justice:

> 1999-2004 TDCJ records reflecting Petitioner's custody during this time-frame make reference to Petitioner's mental health, including references to the following: 1) Schizo-Affective Disorder, Bipolar Type; 2) Mild Mental Retardation; 3) Depression; 4) Post Traumatic Stress Disorder; 5) Personality Disorder NOS with Antisocial and Borderline Features. During this time period Petitioner received mental health treatment and medication, including but not limited to, lithium, haldol, and trazodone.
>
> 11-17-99 Petitioner was diagnosed, classified, and assigned to the Mentally Retarded Offender Program while in TDCJ custody.

Joint List of Stipulated Facts at 1.

B. Applicant's Testimony

Applicant currently is at Gatesville, Texas, in a special unit for mentally retarded inmates serving the fifteen-year sentence she received in January 2007. She takes Haldol, Thorazine, Methium, and Travasol for her "voices and suicide." Tr. of May 12, 2009 Hr'g at 4-5. Her understanding is that her problems are "paranoid schizophrenia, depression, suicidal, and bipolar." Id. at 6.

When applicant first met her appointed attorney, Ray, he told her that "the judge wanted to plea bargain with [her] for

twelve years." Id. at 7. She responded that she did not want it. Id. At that time she told Ray about her mental health, mental retardation, and that she was suicidal. Id. at 8, 10. Ray did not respond to any of those things. Id. at 8.

She tried to commit suicide around December 1, 2006, because she was depressed. Id. at 13. The next thing she knew after she tore her sheet and tied it around her neck tight was when she woke up in ICU at the hospital. Id. at 14. When asked why she was so depressed that she tried to hang herself in jail, she said, "[b]ehind this case because I knew I wouldn't admit to it." Id.

Applicant next saw Ray after she was discharged from the hospital following her suicide attempt. Id. at 15. She told him that she had tried to kill herself and that she needed to go to the doctor or a state hospital or somewhere, but Ray did not seem to be concerned. Id. She had her neck collar on at that time. Id. It was blue and white, and held her chin up. Id. During that meeting, Ray told her the date when they would go to court. About a week after her second meeting with Ray, she appeared in court in connection with her revocation proceeding. When she talked to Ray in the holdover cell, right outside the courtroom, she had her neck collar on and she told Ray that she had tried to

hang herself, to which he responded "I seen, I seen, I seen." Id. at 17. Ray did not seem to be concerned, so she did not say anymore about it. Id.

Applicant's perception of what happened at the hearing was as follows:

> Mr. Ray had me up on the witness stand and testify about the dope case, how the two gentlemens had come in and testified. I wasn't understanding they was taking me to trial for my probation thing because he didn't mention it to me, and then the judge told us to step out, and he came and got me when the judge got ready, and the judge said Ms. Wilson and he said yes and he said what he had to say. I can't remember anything. So before I went up there, I said Mr. Ray, "Are you going to tell them about my neck and stuff and I suicided and mentally retarded?" But he never said anything back. So after that the judge left and went to the chambers and whatever, and he came back, and Mr. Ray told me to stand up, and I stood up, and the judge said "I'm giving you fifteen years in TDC and I was like "Fifteen years? What did I do to get fifteen years?" He just didn't help.

Id. at 18. She was then taken from the courtroom and back to the jail. Id. Applicant has not spoken to Ray since then. Id. Three days later, she was taken to the place where she is serving her sentence. Id. at 19.

C. Ray's Testimony

He was appointed by Judge Gill, the state court trial judge, on November 13, 2006, to represent applicant in her revocation proceeding. Id. at 25-26. Judge Gill regularly appointed him

"outside the process" to represent persons with probation violations. Id. at 25. The judge started giving him appointments of that kind in 2001 or 2002. Id. at 27. Ray would handle anywhere from four to fifteen of those proceedings each week. Id. He estimated that he has handled four or five hundred of those proceedings for Judge Gill. Id. at 27-28. Ray first met applicant in the holdover cell adjacent to the courtroom after he was appointed to represent her. Id. at 26.

Ray described Judge Gill's method of handling a revocation hearing as follows:

> In Judge Gill's court, what would happen is the probation officer would bring their files over to the court. He would look at the files, and he would write whatever his offer was in the file. In his court as opposed to other courts, there was no interaction with the prosecutors. They didn't enter into the conversation unless it became a contested matter. So to answer your question more specifically, Judge Gill made the offers and the negotiations, if there was any, and quite frankly, there wasn't much was directly between myself and Judge Gill.
>
> THE COURT: How did you know what the offer was?
>
> THE WITNESS: He would tell me. He would write it in the file, and it was generally in a specific part of the file. He wrote it down, and I knew what it was.
>
> THE COURT: Did it depend on whether the person confessed?
>
> THE WITNESS: Depended on what they were on probation for and what the new allegation was.

> THE COURT: What was the range? Was it always close to twelve years?
>
> THE WITNESS: In that type of case -- And I have given counsel some of those as your exhibits -- he would almost always if a person had a robbery deferred adjudication and they had a new offense, the offer was almost always twelve years, and it was even predictable. I never bet anybody, so to speak, but I was pretty close to doing it after three or four years. I knew about what he was going to do.

Id. at 28-29 (emphases added).

Judge Gill's offer for a failure-to-report violation traditionally was between five and seven years. Id. at 31. After having handled revocations for Judge Gill for three or four years, he knew about what Judge Gill was going to do. Id.

When he first met with applicant on November 13, he had looked at the file and knew what the Judge's offer was at that time. Id. at 29. He then spoke to Judge Gill, and went and spoke to applicant in the holding cell. Id. Judge Gill typically would leave his offer open until the day of the hearing. Id. at 29-30. On November 13, applicant told Ray that she did not want to accept Judge Gill's offer. Id. at 31.

At the beginning of the revocation hearing, applicant admitted to Judge Gill that she committed two of the non-reporting violations but she denied committing the other and denied having committed the illegal controlled substance offense

described in the petition to proceed. Id. at 34-35. At the conclusion of the hearing Judge Gill found that the alleged drug offense violation was not true, but found that the non-reporting violations were true. Id. at 33-36. Under normal circumstances, Judge Gill's standard sentence for technical violations such as applicant committed would be somewhere between five and eight years. Id. at 37. Normally, his sentence for somebody in applicant's position would have been fifteen years if he found that the defendant violated conditions of supervision by dealing in drugs. Id.

Ray does not have a specific recollection of applicant ever having told him that she was mentally ill. Id. at 31. She well could have told him the things she related in her testimony. Id. at 31-32. If applicant had told him that she had mental problems, he would have told the judge, and the judge probably would have appointed somebody to examine her and to make an evaluation. Id. at 50, 75. He said that "[i]f [he] thought for a second she was incompetent, [he] would have told Judge Gill, and she would have been sent to a psychiatrist and interviewed, and they would have made a recommendation." Id. at 73. If applicant had told him all the things she said in her testimony at this hearing, he "would have got a psychiatrist and have

gotten the records." Id. When asked what likely would have happened if the conclusion was reached that applicant had bad problems that could have explained why she did not report, Ray responded, "[w]e would have had a hearing, and if she had some reason to not have reported -- that might have gone along with that -- Judge Gill would have done that." Id. at 51. If he had known applicant was mentally retarded, he probably would have immediately brought that to Judge Gill's attention, and "[i]t could have made a difference." Id. at 73-74.

If Judge Gill thought a person was incompetent he would appoint a psychologist to see the person in the jail and would then deal with the matter, depending on the report. Id. at 32. His experience with Judge Gill is that a person's mental health generally did not make a whole lot of difference in Judge Gill's decision. Id. at 32-33. However, if Judge Gill thought a person was mentally ill, Judge Gill would have at least made an inquiry and "would have done something different in the sense that he would have had a psychiatric evaluation." Id. at 75.

Ray's notes reflect that he had a conversation with applicant, on December 12, 2006.[5] Id. at 42-43 He does not

[5]The parties stipulated that Ray had jail visits with applicant on December 12, 2006, and January (continued...)

independently recall that applicant was wearing a neck brace when he saw her, but she must have been wearing one at the January 5, 2007, hearing because the transcript shows that two of the witnesses who testified at the hearing identified her as the lady in the neck brace. Id. at 43. He visited applicant at the jail on January 2, 2007. Id. at 58. He does not remember whether she was wearing a neck brace on that date. Id.

Ray understands that if he puts on mitigation evidence, the judge has to consider it. Id. at 52. He did not make any investigation into applicant's mental health or mental retardation issues. Id. at 55. He described the sentencing options Judge Gill had once he decided applicant violated her conditions as follows:

> Put her back on probation. Given her some time in jail. He could have referred her -- If the evidence had supported it and he wanted to, he could have sent her to any number of a drug treatment classes. He could have amended her probation to a more stringent probation, made her report more often, made her go to a residential treatment center. He could have put her on a MHMR case load. Put her on regular probation. If she was physically healthy, he could have sent her to boot camp. A number of things.

Id. at 65-66.

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[5](...continued)
2, 2007. Joint List of Stipulated Facts at 2.

IV.

Proceedings Related to the October 8, 2007, State Court Habeas Application

Applicant's second state court application complained, inter alia, of the failure of Ray to bring to the state court judge's attention her mental illnesses and condition as factors to consider in adjudications to be made by the state court. The State interpreted applicant's claim on that subject to be that Ray was ineffective because of having "failed to bring forward favorable evidence explaining Applicant's situation and circumstances beyond her control" and in failing "to adequately investigate." Clerk's R. for Writ No. C-213-008242-1032954-B (hereinafter, "St. Habeas R.") at 18, 39.

There was no hearing on the application. On October 19, 2007, the State filed a proposed "Memorandum, Findings of Fact and Conclusions of Law" for possible adoption by the state court. Id. at 39. The proposed Conclusions of Law included the following:

> 12. The two-prong test enunciated in Strickland v. Washington applies to ineffective assistance of counsel claims in non-capital cases. Hernandez v. State, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective assistance of counsel, the applicant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable

probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

. . . .

17. Applicant has failed to prove that there was favorable evidence available to explain Applicant's situation a [sic] circumstances beyond her control.

18. Applicant has failed to prove that there was evidence that her attorney should have presented to the trial court.

. . . .

20. Applicant has failed to prove that there was additional investigation that her attorney should have conducted.

. . . .

24. Applicant has failed to prove that her attorney's representation fell below an objective standard of reasonableness.

25. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct sufficient to undermine confidence in the outcome is not established. See Washington v. State, 771 S.W.2d 537, 545 (Tex. Crim. App. 1989), cert. denied, 492 U.S. 912.

. . . .

29. Applicant has failed to show that there is a reasonable probability that, but for the alleged acts of misconduct, the result of the proceeding would be different.

30. Applicant has failed to prove that she received ineffective assistance of counsel.

Id. at 44-45.

By order signed November 5, 2007, the state trial court (acting through a judge different from the one who presided over applicant's revocation hearing) adopted the State's proposed Memorandum, Findings of Fact and Conclusions of Law as his own, and recommended to the Court of Criminal Appeals of Texas that the relief sought by the application be denied. Id. at 48. The Court of Criminal Appeals of Texas denied the relief "WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING" on December 12, 2007. Clerk's R. for Case No. WR-68,309-02.

V.

Analysis

A. Ray's Representation of Applicant was Constitutionally Ineffective

In order to prevail on an ineffective-assistance-of-counsel ground, applicant must show (1) that her counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for her counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). "A reasonable probability is a probability sufficient to

undermine the confidence in the outcome." Id. at 694. Both prongs of the Strickland test must be met to demonstrate ineffective assistance. Id. at 697.

To establish the first prong, applicant must overcome a strong presumption that her counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689. Judicial scrutiny of counsel's conduct must be highly deferential, with every effort made to avoid the distorting effects of hindsight. Id. "It is not enough to show that some, or even most, defense lawyers would have handled the case differently." Green v. Lynaugh, 868 F.2d 176, 178 (5th Cir. 1989). For the second prong, applicant must show that her counsel's errors were so serious as to "deprive [her] of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Both prongs are satisfied by the evidence received at the May 12, 2009, hearing.

The court is satisfied that Ray had sufficient information in advance of the January 5, 2007, hearing to know that there was available evidence that applicant had mental shortcomings. She told him that she had attempted to commit suicide, had mental illnesses, and was mentally retarded. Ray did not take an interest in any of those things, and did not seek to acquire any

knowledge about them. If he had been providing applicant with the kind of legal assistance to which she constitutionally was entitled, he would have made further inquiry, including obtaining and studying the jail records, the records of John Peter Smith Hospital,[6] and applicant's prison records. Had he done so, he would have found that there was an abundance of evidence that could be used in an attempt to persuade Judge Gill not to revoke applicant's term of supervision or, at the very least, to impose a sentence much less severe than imprisonment for fifteen years. Ray's failure to do those things was not the result of any trial strategy or reasoned decision on his part. His conduct fell below an objective standard of reasonableness, and was outside even the widest range of reasonable professional assistance. Ray's conduct amounted to ineffective assistance of counsel that permeated the entire revocation proceeding. In making these findings, the court has been highly deferential in its evaluation of Ray's conduct, and has made every effort to avoid the distorting effects of hindsight. The strong presumption that Ray's conduct falls within the wide range of reasonable

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[6]John Peter Smith Hospital is the county hospital located in the same general area of Fort Worth as the county jail and courthouse. The court judicially knows that the hospital records would have been readily available to Ray if he had requested them pursuant to an authorization signed by applicant.

professional assistance has been overcome by the record in this action.

The court has concluded, and finds, that there is a reasonable probability that, but for the unprofessional conduct of Ray in failing to acquire and bring to Judge Gill's attention the available information about applicant's suicide attempt, mental illness, and mental retardation, Judge Gill would have taken action different from the action he took. At the very least, Judge Gill would have ordered a psychological or psychiatric evaluation of applicant, and would have had complete information about her mental illnesses and mental retardation before making the decisions he made on January 5, 2007.

There is a reasonable probability that, had Judge Gill known what he would have known about applicant if Ray had provided applicant proper legal representation, Judge Gill would have refrained from revoking her supervision and, instead, would have modified the terms of supervision to include appropriate care and treatment for applicant. There is a high probability that if Judge Gill had known what Ray should have brought to his attention about applicant's mental health and intellectual limitations, Judge Gill would not have sentenced her to prison

or, if he did, would have imposed a sentence of a much shorter duration than fifteen years.

A criminal defendant has the right to the effective assistance of counsel, for, as the Supreme Court explained in Strickland:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
>
> For that reason, the Court has recognized that the right to counsel is the right to the effective assistance of counsel.

466 U.S. at 685-86 (internal quotation marks omitted) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). Counsel "can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance." Id. at 686 (internal quotation marks omitted) (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

For the reasons given above, Ray deprived applicant of her right to effective assistance of counsel by his failure to render adequate legal assistance to her. Ray failed to play the role necessary to ensure that applicant's revocation hearing was fair.

He failed to play the role that is critical to the ability of the adversarial system to produce just results.

B. A Hearing on the Application was Appropriate

This case is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), under which certain factors must exist before the court can hold an evidentiary hearing on a habeas claim "[i]f the applicant has failed to develop the factual basis of [the] claim in State court proceedings . . . ." 28 U.S.C. § 2254(e)(2).

Respondent takes the position in his post-hearing brief that the court should not have conducted an evidentiary hearing because "[applicant] has failed to establish that she was not at fault in failing to develop the record in the state court proceeding." Resp't's Post-Hr'g Br. at 6. The court disagrees with respondent's reasoning. The court is satisfied that applicant did all she reasonably could have been expected to do to make known to the state court in her state habeas application that she had mental problems and limitations that Ray should have brought to the state court's attention at the revocation hearing. Obviously she had the assistance of another inmate in the

preparation of her state court application,[7] St. Habeas R. at 4; and, she and whoever prepared the application for her might well have assumed, and undoubtedly did assume, that the state habeas judge would take notice of the contents of her official jail records, the official records of John Peter Smith Hospital (which are an extension of her jail records), and the official prison records concerning her mental illnesses, her intellectual limitations, and her suicide attempt.

While inartfully presented, applicant requested in her state habeas papers that she be given an evidentiary hearing. St. Habeas R. at 14. The state habeas judge simply disregarded her request.[8] Id. at 48. If she had been given a hearing, even with her limited financial and intellectual resources, she could and probably would have put in the habeas record evidence of her

[7]When applicant pleaded guilty on August 18, 2000, her then attorney wrote on the Written Plea Admonishments that applicant was "illiterate and he read the document to her. " Ex. 8 at 3. In applicant's state habeas application she disclosed that she was mentally retarded and unable to read or write. St. Habeas R. at 4.

[8]The court recognizes that the Fifth Circuit said in Dowthitt v. Johnson, 230 F.3d 733, 758 (5th Cir. 2000), that "[m]ere requests for evidentiary hearings" are insufficient for an applicant to diligently pursue the factual development of his claim. The court does not suggest that applicant's request for an evidentiary hearing is the only act by which she exercised diligence. As opposed to the Dowthitt facts, the court finds that applicant (who told the state habeas court under penalty of perjury that (1) she was mentally retarded, (2) she was unable to read or write, (3) a prison counselor was preparing her habeas application for her, (4) she was confined to a mentally retarded offender program, (5) she had a history of mental illness, (6) she needed psychiatric care, and (7) she tried to hang herself) was justified in not attempting to retrieve and attach the hundreds of pages of her mental health records to her application. Also distinguishable from Dowthitt is the fact that the State had in its actual or constructive custody most, if not all, of the evidence supporting applicant's claim.

mental illness and her mental retardation, by her own testimony if through no other means. Applicant was not afforded by the state habeas court any opportunity to provide evidentiary support for her ineffective-assistance-of-counsel claim beyond her verification on her state habeas application.

Section 2254(e)(2)'s restriction on the grant of a hearing applies only if "the applicant has failed to develop the factual basis of a claim in State court proceedings." McDonald v. Johnson, 139 F.3d 1056, 1059 (5th Cir. 1998) (quoting 28 U.S.C. § 2254(e)(2)). A "petitioner cannot be said to have failed to develop a factual basis for his claim unless the undeveloped record is a result of his own decision or omission." Id. (internal quotation marks omitted). The need to develop a record in this action on applicant's ineffective-assistance-of-counsel claim was not the result of applicant's own decision or omission.[9]

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[9]There could be an issue as to why the state habeas court failed to develop a record through a hearing or otherwise. Sections 3(c) and (d) of article 11.07 of the Texas Code of Criminal Procedure impose on the state habeas judge the following potentially pertinent duties once an application for writ of habeas corpus in a non-death penalty case is filed:

> (c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. . . .

(continued...)

Therefore, in determining to have a hearing, this court was guided by the principles announced by the Supreme Court in Townsend v. Sain, 372 U.S. 293, 312-13 (1963), and by Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides that "[i]f the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." 28 U.S.C. foll. § 2254 Rule 8(a); see McDonald v. Johnson, 139 F.3d at 1060; see also Randy Hertz & James L. Liebman, Federal Habeas Corpus Practice and Procedure § 20.1b 892 (5th ed. 2001).

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[9](...continued)

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection.

Tex. Code Crim. Proc. Ann. art. 11.07 §§ 3(c) & (d) (Vernon Supp. 2008). The allegations of the application filed October 8, 2007, quite clearly raised issues of fact relevant to applicant's ineffective-assistance-of-counsel claim. If those facts were not to be deemed admitted for habeas purposes, it would seem that they would be viewed to be previously unresolved controverted facts material to the legality of applicant's confinement. Thus, it appears that the logical action for the state habeas court to have taken would have been to order a hearing or to direct the filing of supporting documentation. The thought occurs to the court that an applicant could reasonably assume that the state court would take action of that kind.

C. This Court is Not Bound by the Findings and Adjudications of the State Court on the Ineffective-Assistance-of-Counsel Ground

Under the AEDPA, the court may not grant habeas relief after an adjudication on the merits in a state court proceeding unless the adjudication of the claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

This court can "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (internal quotation marks omitted) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). "In other words, a federal court may grant relief when a state court has misapplied a governing legal principle to a set of facts different from those of the case in which the principle was announced." Id. (internal quotation marks omitted) (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003)). But, "[t]he question under AEDPA is not whether a

federal court believes the state court's determination was incorrect but whether that determination was unreasonable--a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007). The court has concluded that the state court's rejection of applicant's ineffective-assistance-of-counsel ground involved an unreasonable application of clearly established federal law, as determined by the Supreme Court.

While the state court here correctly identified principles adopted by the Supreme Court in Strickland, it unreasonably applied them to the facts of this particular case. See Perez v. Cain, 529 F.3d 588, 594 (5th Cir. 2008); see also Harrison v. Quarterman, 496 F.3d 419, 424 (5th Cir. 2007) ("A decision constitutes an 'unreasonable application' of clearly established federal law if it is 'objectively unreasonable.'"). In this case, the determinations of the state court as to applicant's ineffective-assistance-of-counsel ground were objectively unreasonable.

Any presumption of correctness of determinations made by the state court relevant to applicant's ineffective-assistance-of-counsel ground has been rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

D. Conclusion

For the reasons given above, Ray deprived applicant of her right to effective assistance of counsel. He failed to play the role that is critical to the ability of the adversarial system to produce just results.

Therefore, the court is conditionally granting applicant's application for writ of habeas corpus. The Judgment Adjudicating Guilt signed by Judge Gill on January 5, 2007, in Case No. 1032954W on the docket of the 213th District Court of Tarrant County, Texas, and dated that same date (which had the effect of revoking applicant's community supervision, adjudicating applicant guilty of the offense of robbery causing bodily injury, and sentencing applicant to a term of 15 years of confinement in the Institutional Division of the Texas Department of Criminal Justice) is being vacated. The court is ordering that, within sixty days of the signing of this order, the State either rehear the petition to proceed to adjudication of guilt and sentencing filed on November 13, 2006, or dismiss that petition; and, the court is requiring the State to notify applicant and this court of its intention within twenty days of the date of the signing of this order.

VI.

The Ground for Habeas Relief Applicant is Seeking to Urge Based on the State Court Trial Judge's Inappropriate Conduct in Conducting Plea Negotiations With Applicant, Through Ray

After having heard Ray's testimony at the May 12, 2009, hearing concerning Judge Gill's practice of plea bargaining with criminal defendants, including the testimony that, through Ray, Judge Gill plea bargained with applicant, the court realized that there might well be basis for another claim to be asserted by applicant in her habeas application. By order signed June 30, 2009, the court directed the parties to submit briefing on the issue of whether the court could entertain such a claim even though applicant did not raise it before the state court.

Applicant responded to the order with a motion for leave to amend her application by adding an additional claim based on Judge Gill's plea bargaining activity. The additional claim, if the amendment were to be allowed, would be that applicant was denied her due process right to have her case decided by an impartial tribunal as guaranteed by the United States Constitution. In her brief in support of her motion to amend, applicant asserted that she had good cause for failing to raise her due process claim in state court because the factual basis

for the claim was not available to her until the May 12, 2009, hearing. She went on to argue that "[b]ecause her claim is one touching on fundamental fairness--that she was denied her right to be adjudicated by an impartial tribunal--it rises to the level of a structural error requiring reversal," and that "[p]rejudice of this magnitude is sufficient to excuse the exhaustion requirement." Br. in Supp. of Mot. to Amend at 3. Applicant alternatively moved for a stay and abeyance so that she might present her new claim to the state court. Respondent opposed the filing of the new claim, but joined applicant in her alternative request that there be a stay and abeyance.

While the court has a serious concern that applicant was denied due process because of Judge Gill's plea bargaining practice, the court has concluded that there is no reason for it to rule on the motion for leave to amend or the alternative request for stay and abeyance. If respondent does not appeal from this court's ruling granting the application based on applicant's ineffective-assistance-of-counsel ground, or if the Fifth Circuit affirms this court's ruling and there is no reversal by the Supreme Court, the motion to amend and the alternative request for stay and abeyance will be moot. Therefore, the court, in effect, is severing those matters from

the ineffective-assistance-of-counsel ruling, with the thought that they will be revisited at a later date if necessary.

VII.

Order

The court ORDERS that applicant's application for relief under 28 U.S.C. § 2254 be, and is hereby, conditionally granted.

The court further ORDERS that the Judgment Adjudicating Guilt signed by Judge Gill on January 5, 2007, in Case No. 1032954W on the docket of the 213th District Court of Tarrant County, Texas, and dated the same day (which had the effect of revoking applicant's community supervision, adjudicating applicant guilty of the offense of robbery causing bodily injury, and sentencing applicant to a term of fifteen years of confinement in the Institutional Division of the Texas Department of Criminal Justice) be, and is hereby, vacated, and that the rulings made by Judge Gill from the bench on January 5, 2007, in Case No. 1032954W on the State's Petition to Proceed to Adjudication, other than his ruling that the charge that applicant committed a drug offense was not true, be, and are hereby, vacated.

The court further ORDERS that within sixty days of the date of the signing of this order the State either cause a new hearing

to be conducted on such petition to proceed or cause such petition to be dismissed with prejudice.

The court further ORDERS that within twenty days of the date of the signing of this order the State notify applicant and this court of its intention relative to the conduct of such a new hearing.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the rulings expressed above in this order and the rulings expressed in the order signed by the court on December 4, 2008, in this action.

SIGNED August 19, 2009.

JOHN McBRYDE
United States District Judge